VILLAGE-COMMUNITIES

IN THE

EAST AND WEST

SIX LECTURES DELIVERED AT OXFORD

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LECTURES, ADDRESSES AND ESSAYS

BY

SIR HENRY SUMNER MAINE
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WITH OTHER LECTURES, ADDRESSES, AND ESSAYS

[redacted]

AUTHOR'S EDITION.

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PREFACE

TO THE

THIRD AND ENLARGED EDITION.

As a Third Edition of the Lectures constituting the volume on 'Village-Communities in the East and West' is now required, it has been thought desirable to add to them some other Lectures, Addresses, and Essays by the author. All of them, except the last will be found to have a bearing on subjects treated of in the Lectures on Village-Communities.

The Rede Lecture, on the 'Effects of Observation of India on Modern European Thought,' has been published separately. The Essays on the 'Theory of Evidence' and on 'Roman Law and Legal Education' appeared respectively in the *Fortnightly Review* and in the *Cambridge Essays*. The three Addresses delivered by the author in the capacity of Vice-Chancellor of the University of Calcutta have not before been printed in this country.

LONDON: *February* 1876.

PREFACE

TO THE

FIRST EDITION OF 'VILLAGE-COMMUNITIES IN THE EAST AND WEST.'

THE SIX LECTURES which follow were designed as an introduction to a considerably longer Course, of which the object was to point out the importance, in juridical enquiries, of increased attention to the phenomena of usage and legal thought which are observable in the East. The writer had not intended to print these Lectures at present; but it appeared to a part of his audience that their publication might possibly help to connect two special sets of investigations, each of which possesses great interest, but is apparently conducted in ignorance of its bearing on the other. The fragmentary character of the work must be pleaded in excuse for the non-performance of some promises which are given in the text, and for some digressions which, with reference to the main subject of discussion, may appear to be of unreasonable length.

The eminent German writers whose conclusions are briefly summarised in the Third and Fifth Lectures are comparatively little known in England, and a list of their principal works is given in the Second Appendix. For such knowledge of Indian phenomena as he possesses the writer is much indebted to the conversation of Lord Lawrence, whose capacity for the political direction of the natives of India was acquired by patient study of their ideas and usages during his early career. The principal statements made in the text concerning the Indian Village-Communities have been submitted to Sir George Campbell, now Lieut.-Governor of Bengal, who has been good enough to say that they coincide in the main with the results of his own experience and observation, which have been very extensive. No general assertions are likely to be true without large qualification of a country so vast as India, but every effort has been made to control the statements of each informant by those of others.

Some matter has been introduced into the Lectures which, for want of time, was omitted at their delivery.

February 1871.

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THE WESTERN VILLAGE-COMMUNITY.

I HAVE AFFIRMED the fact to be established as well as any fact of the kind can be, that there exist in India several—and it may even be said, many—considerable bodies of customary law, sufficiently alike to raise a strong presumption that they either had a common origin or sprang from a common social necessity, but sufficiently unlike to show that each of them must have followed its own course of development. There exists a series of writings which pretend to be a statement of these customs, but this series proves to include a part only of the whole body of usage; it probably embodied from the first only one set of customary rules, and its form shows clearly that it must have had a separate and very distinct history of its own. Few assertions respecting lapse of time and the past can safely be made of anything Indian; but there can be no reasonable doubt that all this customary law is of very great antiquity. I need scarcely point out to you that such facts as these have a

bearing on more than one historical problem. If, for example, I am asked whether it is possible that, when the Roman Empire had been overrun by the Northern races, the Roman law could be preserved by mere oral transmission in countries in which no breviaries of that law were published by the invading chiefs to keep it alive, I can only say that observation of India shows such preservation to be abstractedly possible; and shows it moreover to be possible in the face of written records of a legal or legislative character which contain no reference to the unwritten and orally transmitted rules. But I should at the same time have to point out that nothing in India tends to prove that law may be orally handed down from one generation to another of men who form an indeterminate class, or that it can be preserved by any agency than that of organised, self-acting, social groups. I should further have to observe that, unless there have been habits and practices corresponding to the traditional rules, those rules may be suspected of having undergone considerable modification or depravation.

I pass, however, to matters which have a closer interest for the jurist, and which are, therefore, discussed with more propriety in this department of study. So long as that remarkable analysis of legal conceptions effected by Bentham and Austin is not very widely known in this country (and I see no signs

of its being known on the Continent at all), it is perhaps premature to complain of certain errors, into which it is apt to lead us on points of historical jurisprudence. If, then, I employ the Indian legal phenomena to illustrate these errors, I must preface what I have to say with the broad assertion that nobody who has not mastered the elementary part of that analysis can hope to have clear ideas either of law or of jurisprudence. Some of you may be in a position to call to mind the mode in which these English jurists decompose the conception of a law, and the nature and order of the derivative conceptions which they assert to be associated with the general conception. A law, they say, is a command of a particular kind. It is addressed by political superiors or sovereigns to political inferiors or subjects; it imposes on those subjects an obligation or *duty* and threatens a penalty (or *sanction*) in the event of disobedience. The power vested in particular members of the community of drawing down the sanction on neglects or breaches of the duty is called a Right. Now, without the most violent forcing of language, it is impossible to apply these terms, *command*, *sovereign*, *obligation*, *sanction*, *right*, to the customary law under which the Indian village-communities have lived for centuries, practically knowing no other law civilly obligatory. It would be altogether inappropriate to speak of a political superior commanding a particular course of action

to the villagers. The council of village elders does not command anything, it merely declares what has always been. Nor does it generally declare that which it believes some higher power to have commanded; those most entitled to speak on the subject deny that the natives of India necessarily require divine or political authority as the basis of their usages; their antiquity is by itself assumed to be a sufficient reason for obeying them. Nor, in the sense of the analytical jurists, is there *right* or *duty* in an Indian village-community; a person aggrieved complains not of an individual wrong but of the disturbance of the order of the entire little society. More than all, customary law is not enforced by a sanction. In the almost inconceivable case of disobedience to the award of the village council, the sole punishment, or the sole certain punishment, would appear to be universal disapprobation. And hence, under the system of Bentham and Austin, the customary law of India would have to be called morality—an inversion of language which scarcely requires to be formally protested against.

I shall have hereafter to tell you that in certain of the Indian communities there are signs of one family enjoying an hereditary pre-eminence over the others, so that its head approaches in some degree to the position of chief of a clan, and I shall have to explain that this inherited authority is sometimes partially

and sometimes exclusively judicial, so that the chief becomes a sort of hereditary judge. Of communities thus circumstanced the juristical analysis to which I have been referring is more nearly true. So too the codified Brahminical law could be much more easily resolved into the legal conceptions determined by Bentham and Austin. It assumes that there is a king to enforce the rules which it sets forth, and provides a procedure for him and his subordinates, and penalties for them to inflict; and moreover it becomes true law in the juristical sense, through another peculiarity which distinguishes it. Every offence against this written law is also a sin; to injure a man's property is for instance to diminish the power of his sons to provide properly for expiatory funeral rites, and such an injury is naturally supposed to entail divine punishment on its perpetrator.

We may, however, confine our attention to the unwritten usages declared from time to time by the council of village elders. The fact which has greatest interest for the jurist is one which has been established by the British dominion of India, and which could not probably have been established without it. It may be described in this way. Whenever you introduce any one of the legal conceptions determined by the analysis of Bentham and Austin, you introduce all the others by a process which is apparently inevitable. No better proof

could be given that, though it be improper to employ these terms *sovereign*, *subject*, *command*, *obligation*, *right*, *sanction*, of law in certain stages of human thought, they nevertheless correspond to a stage to which law is steadily tending and which it is sure ultimately to reach.

Nothing is more certain than that the revolution of legal ideas which the English have effected in India was not effected by them intentionally. The relation of sovereign to subject, for instance, which is essential to the modern juridical conception of law, was not only not established by them, but was for long sedulously evaded. When they first committed themselves to a course of territorial aggrandisement, they adopted a number of curious fictions rather than admit that they stood to the people of India as political superior to political inferior. Nor had they the slightest design of altering the customary law of the country. They have been accused of interfering with native usages, but when the interference (which has been on the whole very small) has taken place, it has either arisen from ignorance of the existence of custom or has been forced on them, in very recent times and in the shape of express legislation, by necessities which I may be led hereafter to explain.[1] The English never therefore intended that

[1] I have endeavoured to redeem this promise in part by printing in an Appendix a Minute recorded in India on the subject of the over-legislation not infrequently attributed to the British Government.

the laws of the country should rest on their commands, or that these laws should shift in any way their ancient basis of immemorial usage. One change only they made, without much idea of its importance, and thinking it probably the very minimum of concession to the exigencies of civilised government. They established Courts of Justice in every administrative district. Here I may observe that, though the Brahminical written law assumes the existence of king and judge, yet at the present moment in some of the best governed semi-independent native States there are no institutions corresponding to our Courts of Justice. Disputes of a civil nature are adjusted by the elders of each village-community, or occasionally, when they relate to land, by the functionaries charged with the collection of the prince's revenue. Such criminal jurisdiction as is found consists in the interposition of the military power to punish breaches of the peace of more than ordinary gravity. What must be called criminal law is administered through the arm of the soldier.

In a former Lecture I spoke of the stiffness given to native custom through the influence of English law and English lawyers on the highest courts of appeal. The changes which I am about to describe arose from the mere establishment of local courts of lowest jurisdiction ; and while they have effected a revolution, it is a revolution which in the first

instance was conservative of the rigidity of native usage. The customs at once altered their character. They are generally collected from the testimony of the village elders ; but when these elders are once called upon to give their evidence, they necessarily lose their old position. They are no longer a half-judicial, half-legislative council. That which they have affirmed to be the custom is henceforward to be sought from the decisions of the Courts of Justice, or from official documents which those courts receive as evidence; such, for example, as the document which, under the name of the Record of Rights, I described to you as a detailed statement of all rights in land drawn up periodically by the functionaries employed in settling the claim of the Government to its share of the rental. Usage, once recorded upon evidence given, immediately becomes written and fixed law. Nor is it any longer obeyed as usage. It is henceforth obeyed as the law administered by a British Court, and has thus really become a command of the sovereign. The next thing is that the vague sanctions of customary law disappear. The local courts have of course power to order and guide the execution of their decrees, and thus we have at once the sanction or penalty following disobedience of the command. And, with the command and with the sanction, come the conceptions of legal right and duty. I am not speaking of the logical but of the practical

consequence. If I had to state what for the moment is the greatest change which has come over the people of India and the change which has added most seriously to the difficulty of governing them, I should say it was the growth on all sides of the sense of individual legal right; of a right not vested in the total group but in the particular member of it aggrieved, who has become conscious that he may call in the arm of the State to force his neighbours to obey the ascertained rule. The spread of this sense of individual right would be an unqualified advantage if it drew with it a corresponding improvement in moral judgment. There would be little evil in the British Government giving to native custom a constraining force which it never had in purely native society, if popular opinion could be brought to approve of the gradual amelioration of that custom. Unfortunately for us, we have created the sense of legal right before we have created a proportionate power of distinguishing good from evil in the law upon which the legal right depends.

You will see then that the English government of India consciously introduced into India only one of the conceptions discriminated by the juridical analysis of a law. This was the sanction or penalty; in establishing Courts of Justice they of course contemplated the compulsory execution of decrees. But in introducing one of the terms of the series you will

observe they introduced all the others—the political superior, the command, the legal right and the legal duty. I have stated that the process is in itself one conservative of native usage, and that the spirit introduced from above into the administration of the law by English lawyers was also one which tended to stereotype custom. You may therefore perhaps recall with some surprise the reason which I assigned in my first Lecture for making haste to read the lessons which India furnishes to the juridical student. Indian usage, with other things Indian, was, I told you, passing away. The explanation is that you have to allow for an influence, which I have merely referred to as yet, in connection with the exceptional English Courts at Calcutta, Madras, and Bombay. Over the interior of India it has only begun to make itself felt of late years, but its force is not yet nearly spent. This is the influence of English law; not, I mean, of the spirit which animates English lawyers and which is eminently conservative, but the contagion, so to speak, of the English system of law,—the effect which the body of rules constituting it produces by contact with native usage. Primitive customary law has a double peculiarity: it is extremely scanty in some departments, it is extremely prodigal of rules in others; but the departments in which rules are plentiful are exactly those which lose their importance as the movements of society become

quicker and more various. The body of persons to whose memory the customs are committed has probably always been a quasi-legislative as well as a quasi judicial body, and has always added to the stock of usage by tacitly inventing new rules to apply to cases which are really new. When, however, the customary law has once been reduced to writing and recorded by the process which I have described, it does not supply express rules or principles in nearly sufficient number to settle the disputes occasioned by the increased activity of life and the multiplied wants which result from the peace and plenty due to British rule. The consequence is wholesale and indiscriminate borrowing from the English law—the most copious system of express rules known to the world. The Judge reads English law-books; the young native lawyers read them, for law is the study into which the educated youth of the country are throwing themselves, and for which they may even be said to display something very like genius. You may ask what authority have these borrowed rules in India. Technically, they have none whatever; yet, though they are taken (and not always correctly taken) from a law of entirely foreign origin, they are adopted as if they naturally commended themselves to the reason of mankind; and all that can be said of the process is that it is another example of the influence, often felt in European legal history, which

express written law invariably exercises on unwritten customary law when they are found side by side. For myself, I cannot say that I regard this transmutation of law as otherwise than lamentable. It is not a correction of native usage where it is unwholesome. It allows that usage to stand, and confirms it rather than otherwise; but it fills up its interstices with unamalgamated masses of foreign law. And in a very few years it will destroy its interest for the historical jurist, by rendering it impossible to determine what parts of the structure are of native and what of foreign origin. Nor will the remedial process which it is absolutely necessary to apply for the credit of the British name restore the integrity of the native system. For the cure can only consist in the enactment of uniform, simple, codified law, formed for the most part upon the best European models.

It is most desirable that one great branch of native Indian usage should be thoroughly examined before it decays, inasmuch as it is through it that we are able to connect Indian customary law with what appears to have once been the customary law of the Western World. I speak of the Indian customs of agricultural tenure and of collective property in land.

For many years past there has been sufficient evidence to warrant the assertion that the oldest discoverable forms of property in land were forms of collective property, and to justify the conjecture that

separate property had grown through a series (though not always an identical series) of changes, out of collective property or ownership in common. But the testimony which was furnished by the Western World had one peculiarity. The forms of collective property which had survived and were open to actual observation were believed to be found exclusively in countries peopled by the Sclavonic race. It is true that historical scholars who had made a special study of the evidence concerning ancient Teutonic holdings, as, for example, the early English holdings, might have been able to assert of them that they pointed to the same conclusions as the Sclavonic forms of village property; but the existing law of property in land, its actual distribution and the modes of enjoying it, were supposed to have been exclusively determined in Teutonic countries by their later history. It was not until Von Maurer published a series of works, in which his conclusions were very gradually developed, that the close correspondence between the early history of Teutonic property and the facts of proprietary enjoyment in the Germany of our own day was fully established; and not two years have elapsed since Nasse called attention to the plain and abundant vestiges of collective Teutonic property which are to be traced in England.

I shall not attempt to do more than give you such a summary of Von Maurer's conclusions as may suffice

to connect them with the results of official observation and administrative enquiry in India. You will find a somewhat fuller compendium of them in the paper contributed by Mr. Morier to the volume recently published, called 'Systems of Land Tenure in Various Countries.' Mr. Morier is the English Chargé d'Affaires at Darmstadt, and he assures me that his account of the abundant vestiges of collective property which are to be found in the more backward parts of Germany may easily be verified by the eye. They are extremely plain in some territorial maps with which he has been good enough to supply me.

The ancient Teutonic cultivating community, as it existed in Germany itself, appears to have been thus organised. It consisted of a number of families standing in a proprietary relation to a district divided into three parts. These three portions were the Mark of the Township or Village, the Common Mark or waste, and the Arable Mark or cultivated area. The community inhabited the village, held the common mark in mixed ownership, and cultivated the arable mark in lots appropriated to the several families.—

Each family in the township was governed by its own free head or paterfamilias. The precinct of the family dwelling house could be entered by nobody but himself and those under his *patria potestas*, not even by officers of the law, for he himself made law within and enforced law made without.

But, while he stood under no relations controllable by others to the members of his family, he stood in a number of very intricate relations to the other heads of families. The sphere of usage or customary law was not the family, but the connection of one family with another and with the aggregate community.

Confining ourselves to proprietary relations, we find that his rights or (what is the same thing) the rights of his family over the Common Mark are controlled or modified by the rights of every other family. It is a strict ownership in common, both in theory and in practice. When cattle grazed on the common pasture, or when the householder felled wood in the common forest, an elected or hereditary officer watched to see that the common domain was equitably enjoyed.

But the proprietary relation of the householder which has most interest for us is his relation to the Arable Mark. It seems always in theory to have been originally cut out of the common mark, which indeed can only be described as the portion of the village domain not appropriated to cultivation. In this universally recognised original severance of the arable mark from the common mark we come very close upon the beginning of separate or individual property. The cultivated land of the Teutonic village-community appears almost invariably to have been divided into three great fields. A rude rotation of crops was the

object of this threefold division, and it was intended that each field should lie fallow once in three years.

The fields under tillage were not however cultivated by labour in common. Each householder has his own family lot in each of the three fields, and this he tills by his own labour, and that of his sons and his slaves. But he cannot cultivate as he pleases. He must sow the same crop as the rest of the community, and allow his lot in the uncultivated field to lie fallow with the others. Nothing he does must interfere with the right of other households to have pasture for sheep and oxen in the fallow and among the stubbles of the fields under tillage. The rules regulating the modes of cultivating the various lots seem to have been extremely careful and complicated, and thus we may say without much rashness that the earliest law of landed property arose at the same time when the first traces of individual property began to show themselves, and took the form of usages intended to produce strict uniformity of cultivation in all the lots of ground for the first time appropriated. That these rules should be intricate is only what might be expected. (The simplicity of the earliest family law is not produced by any original tendency of mankind, but is merely the simplicity which goes always with pure despotism.) Ancient systems of law are in one sense scanty. The number of subjects with which they deal is

small, and, from the modern jurist's point of view, there are great gaps in them. But the number of minute rules which they accumulate between narrow limits is very surprising. The most astonishing example of this is to be found in the translation of the Ancient Irish law now in course of publication by the Irish Government. The skeleton of this law is meagre enough, but the quantity of detail is vast—so vast that I cannot but believe that much of it is attributable to the perverted ingenuity of a class of hereditary lawyers.

The evidence appears to me to establish that the Arable Mark of the Teutonic village-community was occasionally shifted from one part of the general village domain to another. It seems also to show that the original distribution of the arable area was always into exactly equal portions, corresponding to the number of free families in the township. Nor can it be seriously doubted upon the evidence that the proprietary equality of the families composing the group was at first still further secured by a periodical redistribution of the several assignments. The point is one of some importance. One stage in the transition from collective to individual property was reached when the part of the domain under cultivation was allotted among the Teutonic races to the several families of the township; another was gained when the system of 'shifting severalties' came

to an end, and each family was confirmed for a perpetuity in the enjoyment of its several lots of land. But there appears to be no country inhabited by an Aryan race in which traces do not remain of the ancient periodical redistribution. It has continued to our own day in the Russian villages. Among the Hindoo villagers there are widely extending traditions of the practice; and it was doubtless the source of certain usages, to be hereafter described, which have survived to our day in England and Germany.

I quote from Mr. Morier's paper the following observations. 'These two distinct aspects of the early Teutonic freeman as a "lord" and a "commoner" united in the same person—one when within the pale of his homestead, the other when standing outside that pale in the economy of the mark—should not be lost sight of. In them are reflected the two salient characteristics of the Teutonic race, the spirit of individuality, and its spirit of association; and as the action and reaction of these two laws have determined the social and political history of the race, so they have in an especial manner affected and determined its agricultural history.'

Those of you who are familiar with the works of Palgrave, Kemble, and Freeman, are aware that the most learned writers on the early English proprietary system give an account of it not at variance in any

material point with the description of the Teutonic mark which I have repeated from Von Maurer. The question, then, which at once presses on us is whether an ancient form of property, which has left on Germany traces so deep and durable that (again to quote Mr. Morier) they may always be followed on ordinary territorial maps, must be believed to have quite died out in England, leaving no sign of itself behind? Unquestionably the answer furnished by the received text-books of English real-property law is affirmative. They either assume, or irresistibly suggest, that the modern law is separated from the ancient law by some great interruption; and Nasse, the object of whose work is to establish the survival of the Mark in England, allows that German enquirers had been generally under the impression that the history of landed property in this country was characterised by an exceptional discontinuity. There is much in the technical theory of our real-property law which explains these opinions; and it is less wonderful that lawyers should have been led to them by study of the books, than that no doubt of their soundness should have been created by facts with which practitioners were occasionally well acquainted. These facts, establishing the long continuance of joint cultivation by groups modelled on the community of the Mark, were strongly pressed upon the Select Committee of the House of Commons

which sat to consider the subject of inclosures in 1844 by a witness, Mr. Blamire, who was at once a lawyer and an official unusually familiar with English landed property in its less usual shapes. Yet Mr. Blamire appears ('Evidence before Select Committee of 1844,' p. 32, q. 335) to have unreservedly adopted the popular theory on the subject, which I believe to be that at some period—sometimes vaguely associated with the feudalisation of Europe, sometimes more precisely with the Norman Conquest—the entire soil of England was confiscated; that the whole of each manor became the lord's demesne; that the lord divided certain parts of it among his free retainers, but kept a part in his own hands to be tilled by his villeins; that all which was not required for this distribution was left as the lord's waste; and that all customs which cannot be traced to feudal principles grew up insensibly, through the subsequent tolerance of the feudal chief.

There has been growing attention for some years past to a part of the observable phenomena which prove the unsoundness of the popular impression. Many have seen that the history of agriculture, of land-law, and of the relations of classes cannot be thoroughly constructed until the process has been thoroughly deciphered by which the common or waste-land was brought under cultivation either by the lord of the manor or by the lord of the manor

in connection with the commoners. The history of Inclosures and of Inclosure Acts is now recognised as of great importance to our general history. But corresponding study has not, or not of late, been bestowed on another set of traces left by the past The Arable Mark has survived among us as well as the Common Mark or waste, and it the more deserves our attention in this place because its interest is not social or political but purely juridical.

The lands which represent the cultivated portion of the domain of the ancient Teutonic village-communities are found more or less in all parts of England, but more abundantly in some counties than in others. They are known by various names. When the soil is arable, they are most usually called 'common,' 'commonable,' or 'open' fields, or sometimes simply 'intermixed' lands. When the lands are in grass, they are sometimes known as 'lot meadows,' sometimes as 'lammas lands,' though the last expression is occasionally used of arable soil. The 'common fields' are almost invariably divided into three long strips, separated by green baulks of turf. The several properties consist in subdivisions of these strips, sometimes exceedingly minute; and there is a great deal of evidence that one several share in each of the strips belonged originally to the same ownership, and that all the several shares in any one strip were originally equal or nearly equal, though in progress of time a

good many have been accumulated in the same hands. The agricultural customs which prevail in these common fields are singularly alike. Each strip bears two crops of a different kind in turn and then lies fallow. The better opinion seems to be that the custom as to the succession of crops would not be sustained at law; but the right to feed sheep or cattle on the whole of one strip during the fallow year, or among the stubbles of the other two strips after the crops have been got in, or on the green baulks which divide the three fields, is generally treated as capable of being legally maintained. This right has in some cases passed to the lord of the manor, but sometimes it is vested in the body of persons who are owners of the several shares in the common fields. The grass lands bear even more distinct traces of primitive usage. The several shares in the arable fields, sometimes, but very rarely, shift from one owner to another in each successive year; but this is frequently the rule with the meadows, which, when they are themselves in a state of severalty, are often distributed once a year by casting lots among the persons entitled to appropriate and enclose them, or else change from one possessor to another in the order of the names of persons or tenements on a roll. As a rule the inclosures are removed after the hay-harvest; and there are manors in which they are taken down by the villagers on Lammas Day (that is, Old

Lammas Day) in a sort of legalised tumultuary assembly. The group of persons entitled to use the meadows after they have been thrown open is often larger than the number of persons entitled to enclose them. All the householders in a parish, and not merely the landowners, are found enjoying this right. The same peculiarity occasionally, but much more rarely, characterises the rights over common arable fields; and it is a point of some interest, since an epoch in the history of primitive groups occurs when they cease to become capable of absorbing strangers. The English cultivating communities may be supposed to have admitted new-comers to a limited enjoyment of the meadows, up to a later date than the period at which the arable land had become the exclusive property of the older families of the group.

The statute 24 Geo. II. c. 23, which altered the English Calendar, recites (s. 5) the frequency of these ancient customs and forms of property, and provides that the periods for commencing common enjoyment shall be reckoned by the old account of time. They have been frequently noticed by agricultural writers, who have strongly and unanimously condemned them. There is but one voice as to the barbarousness of the agriculture perpetuated in the common arable fields, and as to the quarrels and heart-burning of which the 'shifting severalties' in the meadow land have been the source. But both

common fields and common meadows are still plentiful on all sides of us. Speaking for myself personally, I have been greatly surprised at the number of instances of abnormal proprietary rights, necessarily implying the former existence of collective ownership and joint cultivation, which comparatively brief enquiry has brought to my notice; nor can I doubt that a hundred and fifty years ago instances of such rights could have been produced in vastly greater numbers, since Private Acts of Parliament for the inclosure of commonable fields were constantly passed in the latter part of the last and the earlier part of the present century, and since 1836 they have been extensively enclosed, agglomerated, and exchanged under the Common Fields Inclosure Act passed in that year, and under the general powers more recently vested in the Inclosure Commissioners. The breadth of land which was comparatively recently in an open, waste, or commonable condition, and which therefore bore the traces of the ancient Teutonic cultivating system, may be gathered from a passage in which Nasse sums up the statements made in a number of works by a writer, Marshall, whom I shall presently quote. 'In almost all parts of the country, in the Midland and Eastern Counties particularly, but also in the West—in Wiltshire for example—in the South, as in Surrey, in the North, as in Yorkshire, there are extensive open and common

fields. Out of 316 parishes in Northamptonshire, 89 are in this condition; more than 100 in Oxfordshire; about 50,000 acres in Warwickshire; in Berkshire, half the county; more than half of Wiltshire; in Huntingdonshire, out of a total area of 240,000 acres, 130,000 were commonable meadows, commons, and common fields.' (Ueber die Mittelalterliche Feldgemeinschaft in England,' p. 4.) The extent of some of the fields may be inferred from the fact, stated to me on good authority, that the pasturage on the dividing baulks of turf, which were not more than three yards wide, was estimated in one case at eighty acres. These footprints of the past were quite recently found close to the capital and to the seats of both Universities. In Cambridgeshire they doubtless corresponded to the isolated patches of dry soil which were scattered through the fens, and in the metropolitan county of Surrey, of which the sandy and barren soil produced much the same isolation of tillage as did the morasses of the fen country, they occurred so close to London as to impede the extension of its suburbs, through the inconvenient customs which they placed in the way of building. One of the largest of the common fields was found in the immediate neighbourhood of Oxford; and the grassy baulks which anciently separated the three fields are still conspicuous from the branch of the Great Northern Railway which leads to Cambridge.

The extract from Marshall's 'Elementary and Practical Treatise on Landed Property' (London, 1804) which I am about to read to you, is in some ways very remarkable. Mr. William Marshall was a writer on agriculture who published largely between 1770 and 1820, and he has left an account of the state of cultivation in almost every English county. He had been engaged for many years in 'studying the improvement and directing the management of several large estates in England, Wales and Scotland,' and he had taken a keen interest in what he terms 'provincial practices.' The picture of the ancient state of England which follows, was formed in his mind from simple observation of the phenomena of custom, tillage, and territorial arrangement which he saw before his eyes. You will perceive that he had not the true key in his possession, and that he figured to himself the collective form of property as a sort of common farm, cultivated by the tenantry of a single landlord.

'In this place it is sufficient to premise that a very few centuries ago, nearly the whole of the lands of England lay in an open, and more or less in a commonable state. Each parish or township (at least in the more central and northern districts), comprised different descriptions of lands; having been subjected, during successive ages, to specified modes of occupancy, under ancient and strict regulations,

which time had converted to law. These parochial arrangements, however, varied somewhat in different districts; but in the more central and greater part of the kingdom, not widely; and the following statement may serve to convey a general idea of the whole of what may be termed Common-field Townships, throughout England.

'Under this ingenious mode of organisation, each parish or township was considered as one common farm; though the tenantry were numerous.

'Round the village, in which the tenants resided, lay a few small inclosures, or grass yards; for rearing calves, and as baiting and nursery grounds for other farm stock. This was the common farmstead, or homestall, which was generally placed as near the centre of the more culturable lands of the parish or township as water and shelter would permit.

'Round the homestall, lay a suit of arable fields; including the deepest and soundest of the lower grounds, situated out of water's way; for raising corn and pulse; as well as to produce fodder and litter for cattle and horses in the winter season.

'And, in the lowest situation, as in the water-formed base of a rivered valley, or in swampy dips, shooting up among the arable lands, lay an extent of meadow grounds, or "ings"; to afford a supply of hay, for cows and working stock, in the winter and spring months.

'On the outskirts of the arable lands, where the soil is adapted to the pasturage of cattle, or on the springy slope of hills, less adapted to cultivation, or in the fenny bases of valleys, which were too wet, or gravelly water formed lands which were too dry, to produce an annual supply of hay with sufficient certainty, one or more stinted pastures, or hams, were laid out for milking cows, working cattle, or other stock which required superior pasturage in summer.

'While the bleakest, worst-soiled, and most distant lands of the township, were left in their native wild state; for timber and fuel; and for a common pasture, or suit of pastures; for the more ordinary stock of the township; whether horses, rearing cattle, sheep, or swine; without any other stint, or restriction, than what the arable and meadow lands indirectly gave; every joint-tenant, or occupier of the township, having the nominal privilege of keeping as much live-stock on these common pastures, in summer, as the appropriated lands he occupied would maintain, in winter.

'The appropriated lands of each township were laid out with equal good sense and propriety. That each occupier might have his proportionate share of lands of different qualities, and lying in different situations, the arable lands, more particularly, were divided into numerous parcels, of sizes, doubtless, according to the size of the given township, and the number and rank of the occupiers.

'And, that the whole might be subjected to the same plan of management, and be conducted as one common farm, the arable lands were moreover divided into compartments, or "fields," of nearly equal size and generally three in number, to receive, in constant rotation, the triennial succession of fallow, wheat (or rye) and spring crops (as barley, oats, beans, and peas): thus adopting and promoting a system of husbandry, which, howsoever improper it is become, in these more enlightened days, was well adapted to the state of ignorance, and vassalage, of feudal times when each parish or township had its sole proprietor the occupiers being at once his tenants and his soldiers, or meaner vassals. The lands were in course liable to be more or less deserted by their occupiers and left to the feebleness of the young, the aged, and the weaker sex. But the whole township being, in this manner, thrown into one system, the care and management of the live-stock, at least, would be easier and better than they would have been, under any other arrangement. And, at all times. the manager of the estate was better enabled to detect bad husbandry, and enforce that which was more profitable to the tenants and the estate, by having the whole spread under the eye, at once, than he would have been, had the lands been distributed in detached inclosed farmlets; besides avoiding the expense of inclosure. And another advantage arose from the

more social arrangement, in barbarous times: the tenants, by being concentrated in villages, were not only best situated to defend each other from predatory attacks; but were called out, by their lord, with greater readiness, in cases of emergency.' (Marshall, pp. 111–113.)

The readers of the 'Pirate' are, I dare say, aware that Sir Walter Scott had his attention strongly attracted to the so-called Udal tenures of Orkney and Shetland. The fact has more juridical interest than it once had, now that recent writers have succeeded in completely identifying the ancient Scandinavian and ancient German proprietary usages. In the diary which he wrote of his voyage with the Commissioners of Lighthouses round the coasts of Scotland, Scott observes: 'I cannot get a distinct account of the nature of the land-rights. The Udal proprietors have ceased to exist, yet proper feudal tenures seem ill understood. Districts of ground are in many instances understood to belong to townships or communities, possessing what may be arable by patches and what is moor as a commonty *pro indiviso*. But then individuals of such a township often take it upon them to grant feus of particular parts of the property thus possessed *pro indiviso*. The town of Lerwick is built upon a part of the commonty of Sound; the proprietors of the houses having feu-rights from different heritors of that township, but why

from one rather than other . . . . seems altogether uncertain' (Lockhart's 'Life of Scott,' iii. p. 145). That these tenures survived till lately in the northern islands has been long known, but there has been a general impression that the strict and consistent feudalism of Scotland had effaced the traces of older Teutonic usage in the Lowlands. Yet a return recently presented to Parliament suggests that a re-examination of Scottish agricultural customs might be usefully undertaken. 'There are,' it is stated, 'within the bounds of the royalty of the burgh of Lauder 105 separate portions of land called Burgess Acres. These vary in extent from one and a half acre to three and a half acres. To each such acre there is a separate progress of writs, and these "Acres" are the private and absolute property of individuals. . . . No one has hitherto been admitted a burgess of the burgh who has not been an owner of one of these Burgess Acres. The lands of the burgh consist of . . . . Lauder Common, extending to about 1,700 acres, which has, from all time of which there is any record, been possessed thus. A portion of it has been set off periodically, say once in five or seven years, to be broken up and ploughed during that time, and at the end of that time fixed has been laid down in grass, and grazed along with the other lands: when another portion of the common was, in the same way, broken up and ploughed, and again laid down in

grass. The portion of the common so broken up and ploughed at a time has, of recent years, been about 130 acres in extent. An allotment of this portion of the common has been given to the owner of each of the 105 burgess acres, whether he happened to be a burgess or not, one allotment for each acre. The portion laid off for cultivation is, in the first place, cut into the number of allotments required, and the share of each person is decided by lot. The conditions attached to the taking of hill parts have been, compliance with a system of cultivation prescribed by the town council, and payment of a small assessment, generally just sufficient to reimburse the burgh for expenses laid out in making roads, drains, &c., to enhance the value of the land for cultivation. These allotments have been called "Hill parts," and the average worth of each is 1*l.* per annum. The whole of the remainder of the common has been used for grazing purposes, and has been occurred as follows: Each burgess resident within the bounds of the burgh has grazed on the common two cows, or an equivalent, and a certain number of sheep—at present, and for some years, fifteen; and each widow of a burgess, resident in the burgh, has grazed on the common one cow, or an equivalent, and a certain number of sheep —at present, and for many years, twelve' ('Return of Boroughs or Cities in the United Kingdom, possessing Common Land,' Appendix I., House of Commons, August 10, 1870).

It may be doubted whether a more perfect example of the primitive cultivating community is extant in England or Germany. As compared with the English instances, its form is extremely archaic. The arable mark, cultivated under rules prescribed by the town council, shifts periodically from one part of the domain to another, and the assignment of parcels within the cultivated area is by lot. It is interesting too to observe that the right to land for purposes of tillage is inseparably connected with the ownership of certain plots of land within the township. A similar connection between the shares in the common field and certain ancient tenements in a village is sometimes found in England and has been formally established at law. (See the bitter complaints of Marshall, 'Rural Economy of Yorkshire,' i. 55.) On the other hand, a group of persons more loosely defined has the right to pasture on the part of the common in grass, and this peculiarity occurs also in England. I am informed that most of the Scottish burghs have recently sold their 'commonties;' but it is to be hoped that all traces of the ancient customs of enjoyment have not been quite obliterated.

Upon the evidence collected by Nasse, supplied by the works of Marshall, and furnished by the witnesses examined before the Select Committee of 1844, and upon such as I have myself been able to gather, the vestiges of the Teutonic village-community which

remained before the inclosures of the last century and the present may be thus compendiously described: The arable part of the domain was indicated (1) by simple intermixed fields, *i.e.* fields of nearly equal size mingled together and belonging to an extraordinary number of owners, so that, according to Mr. Blamire's statement, in one parish containing 2,831 acres there were (in 1844) 2,315 pieces of open land which included 2,327 acres, giving an average size of one acre (Evidence, Select Committee, p. 17, q. 185); (2) by fields of nearly equal size arranged in three long strips and subject to various customs of tillage, the most universal being the fallow observed by each of the strips in successive years; (3) by 'shifting severalties' of arable land, which were not, however, of frequent occurrence; (4) by the existence of certain rights of pasture over the green baulks which prevented their removal.

The portion of the domain kept in grass was represented: (1) by 'shifting severalties' of meadow land, which were very frequent, the modes of successive allotment being also very various; (2) by the removal of inclosures after hay-harvest; (3) by the exercise, on the part of a community generally larger than the number of persons entitled to enclose, of a right to pasture sheep and cattle on the meadow-land during the period when the hay was not maturing for harvest.

The rights known to exist over Commons constitute much too large a subject to be treated of here. But two relics of the ancient collective cultivation may be specially mentioned. The supervision of the communal officer who watched over the equitable enjoyment of the pastures has become the custom of 'stint of common,' by which the number of the beasts which the commoner might turn out on the waste is limited and regulated. There is also a good deal of evidence that some commons, now entirely waste, bear the traces of ancient tillage. The most probable explanation is that in these cases the whole of the arable mark had been removed from one part of the domain to another, and that the traces of cultivation show the place of common fields anciently deserted.

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LECTURE IV.

THE EASTERN VILLAGE-COMMUNITY.

CONTENTS.

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THE EASTERN VILLAGE-COMMUNITY.

I PROPOSE in this Lecture to describe summarily and remark upon the Indian forms of property and tenure corresponding to the ancient modes of holding and cultivating land in Europe which I discussed at some length last week. It does not appear to me a hazardous proposition that the Indian and the ancient European systems of enjoyment and tillage by men grouped in village-communities are in all essential particulars identical. There are differences of detail between them, and I think you will find the discussion of these differences and of their apparent causes not uninteresting nor barren of instruction to the student of jurisprudence.

No Indian phenomenon has been more carefully examined, and by men more thoroughly in earnest, than the Village-Community. For many years past the discovery and recognition of its existence have ranked among the greatest achievements of Anglo-Indian administration. But the Village-Community did not emerge into clear light very early in the

history of our conquest and government. Although this peculiar group is referred to in Manu, the English found little to guide them to its great importance in the Brahminical codified law of the Hindoos which they first examined. Perhaps in the large space assigned in that law to joint-property and partitions they might have found a hint of the truth, if the great province in which they were first called upon to practise administration on a large scale, Lower Bengal or Bengal Proper, had not happened to be the exact part of India in which, from causes not yet fully determined, the village system had fallen into great decay. The assumption which the English first made was one which they inherited from their Mahometan predecessors. It was, that all the soil belonged in absolute property to the sovereign, and that all private property in land existed by his sufferance. The Mahometan theory and the corresponding Mahometan practice had put out of sight the ancient view of the sovereign's rights, which, though it assigned to him a far larger share of the produce of the land than any western ruler has ever claimed, yet in nowise denied the existence of private property in land. The English began to act in perfect good faith on the ideas which they found universally prevailing among the functionaries whom they had taken over from the Mahometan semi-independent viceroys dethroned by their arms. Their earliest experiments,

tried in the belief that the soil was theirs and that any land-law would be of their exclusive creation, have now passed into proverbs of maladroit management. The most famous of them was the settlement of Lower Bengal by Lord Cornwallis. It was an attempt to create a landed-proprietary like that of this country. The policy of conferring estates in fee simple on the natural aristocracy of certain parts of India (and I mean by a 'natural aristocracy' an aristocracy formed under purely native conditions of society by what amounts to the sternest process of natural selection) has had many fervent advocates among Indian functionaries, and has very lately been carried out on a considerable scale in the newly-conquered province of Oudh. But the great proprietors established by Lord Cornwallis were undoubtedly, with few exceptions, the tax-gatherers of the former Mahometan viceroy. The recoil from what was soon recognised as a mistake, brought a system into fashion which had been tried on a small scale at an earlier date, and which was in fact the reverse of Lord Cornwallis's experiment. In the southern provinces of the peninsula, the English Government began to recognise nothing between itself and the immediate cultivators of the soil; and from them it took directly its share of the produce. The effect was to create a peasant-proprietary. This system, of which the chief seat was the province of Madras, has, in

my opinion, been somewhat unjustly decried. Now that it has been modified in some details, and that some mistakes first committed have been corrected, there is no more prosperous population in India than that which has been placed under it; but undoubtedly it is not the ancient system of the country. It was not till English conquest was extending far to the north-west, and till warlike populations were subjugated whose tastes and peculiarities it was urgently necessary to study, that the true proprietary unit of India was discovered. It has ever since been most carefully and continuously observed. There have been many vehement and even violent disputes about some of its characteristics; but these disputes will always, I think, be found to arise, or at least to derive their point, from an attempt to make it fit in with some theory of English origin. There is no substantial difference of opinion about its great features. I regret exceedingly that I cannot refer you to any book in which there is a clear or compendious account of it. Perhaps the best and most intelligible is that given by a distinguished Indian functionary, Mr. George Campbell, in that same volume on 'Systems of Land Tenure' to which I referred you for Mr. Morier's summary of Von Maurer's conclusions. But the description is necessarily much too brief for a subject of such extent, and full information must be obtained from the extensive literature of Revenue and Settlement

which I spoke of some time since as having had its materials collected by quasi-judicial agencies. But the student who attempts to consult it should be warned that much of the elementary knowledge which has to be acquired before its value and interest can be completely understood is only at present to be gathered from the oral statements of experienced Indian functionaries. In the account of the Indian cultivating group which follows you will understand that I confine myself to fundamental points, and further that I am attempting to describe a typical form to which the village-communities appear to me upon the evidence I have seen to approximate, rather than a model to which all existing groups called by the name can be exactly fitted.

If very general language were employed, the description of the Teutonic or Scandinavian village-communities might actually serve as a description of the same institution in India. There is the arable mark, divided into separate lots but cultivated according to minute customary rules binding on all. Wherever the climate admits of the finer grass crops, there are the reserved meadows, lying generally on the verge of the arable mark. There is the waste or common land, out of which the arable mark has been cut, enjoyed as pasture by all the community *pro indiviso*. There is the village, consisting of habitations each ruled by a despotic pater-familias. And

there is constantly a council of government to determine disputes as to custom. But there are some characteristics of the institution of which no traces, or very faint traces, remain in Europe, though they probably once existed, and there are some differences between the European and Indian examples. Identity in the main being assumed, a good deal of instruction may be obtained from these distinctions of detail.

First as to the arable mark, or cultivated portion of the village domain. Here you will naturally expect the resemblances to be general rather than specific. The official publications on Indian Settlement law contain evidence that in some parts of the country the division into three common fields is to be found; but I do not attach any importance to the fact, which is probably quite accidental. The conditions of agriculture in a tropical country are so widely different from those which can at any period be supposed to have determined cultivation in Northern and Central Europe as to forbid us to look for any resemblances in India, at once widely extended and exact, to the Teutonic three-field system. Indeed, as the great agent of production in a tropical country is water, very great dissimilarities in modes of cultivation are produced within India itself by relative proximity to running streams and relative exposure to the periodical rain-fall. The true

analogy between the existing Indian and the ancient European systems of tillage must be sought in the minute but multifarious rules governing the proceedings of the cultivators; rules which in both cases have the same object—to reconcile a common plan and order of cultivation on the part of the whole brotherhood with the holding of distinct lots in the arable land by separate families. The common life of the group or community has been so far broken up as to admit of private property in cultivated land, but not so far as to allow departure from a joint system of cultivating that land. There have been functionaries serving the British Government of India who have had the opportunity of actually observing the mode in which rules of this kind grow up. Wherever the great canals of irrigation which it has constructed pass through provinces in which the system of village-communities survives in any completeness, the Government does not undertake—or perhaps I should rather say it has not hitherto undertaken—the detailed distribution of water to the peasants inhabiting the village. It bargains with them to take a certain quantity of water in return for a certain addition to the revenue assessed upon them, and leaves them, when the water has once been conducted to the arable mark, to divide it between themselves as they please. A number of minute rules for

regulating each man's share of the water and mode of using it are then imposed on the village, by the council of elders, by the elective or hereditary functionary who sometimes takes its place, or by the person who represents the community in its contracts with Government for payment of land-rent. I have been told, however, by some of those who have observed the formation of these rules, that they do not purport to emanate from the personal authority of their author or authors; nor do they assume to be dictated by a sense of equity; there is always, I am assured, a sort of fiction, under which some customs as to the distribution of water are supposed to have existed from all antiquity, although in fact no artificial supply had been even so much as thought of. It is further stated that, though it is extremely common among English functionaries to speak of the distribution of water as regulated by the agreement of the villagers, yet no such idea really enters the mind of the community or of its representatives as that there can be or ought to be an express or implied contract among the cultivators respecting their several shares. And it is added that, rather than have a contract or agreement, it would appear to them a much more natural and reasonable arrangement that the distribution should be determined by casting lots. Authority, Custom, or Chance are in fact the great sources of law in primitive communi-

ties as we know them, not Contract. Not that in the minds of men who are at this stage of thought the acknowledged sources of law are clearly discriminated. There are many customary duties of which the most plausible account that can be given is that they were at the outset obligations of kinship, sanctioned by patriarchal authority; yet childish stories attributing their origin to mere accident are often current among the Indian villagers, or they are said to be observed in obedience to the order of some comparatively modern king. I have already said that the power of the sovereign to create custom is very generally recognised in India; and it might even be said that such ideas of the obligatory force of agreement as exist are nowadays greatly mixed up with the notion of obedience to government. It is often stated that an agreement written on the stamped paper of the State acquires in the native view a quality which is quite independent of the legal operation of the stamp; and there is reason to believe that the practice, which prevails through whole provinces, of never performing an agreement till performance has been decreed by a Court, is to a very great extent accounted for by an impression that contracts are not completely binding till the State has directed them to be executed.

Among the non-Aryan peasantry who form a considerable proportion of the population in the still

thinly peopled territory called the Central Provinces, the former highroad of Mahratta brigandage, there are examples of the occasional removal of the entire arable mark from one part of the village domain to another, and of the periodical redistribution of lots within the cultivated area. But I have not obtained information of any systematic removal, and still less of any periodical re-partition of the cultivated lands, when the cultivators are of Aryan origin. But experienced Indian officials have told me that though the practice of redistribution may be extinct, the tradition of such a practice often remains, and the disuse of it is sometimes complained of as a grievance. If English influence has had anything to do with arresting customs of re-partition, which are, no doubt, quite alien to English administrative ideas, it is a fresh example of destructive influence, unwillingly and unconsciously exercised. For the separate, unchangeable, and irremovable family lot in the cultivated area, if it be a step forwards in the history of property, is also the point at which the Indian village-community is breaking to pieces. The probability, however, is that the causes have had their operation much hastened by the English, but have not been created by them. The sense of personal right growing everywhere into greater strength, and the ambition which points to wider spheres of action than can be found within the Community, are both destructive

of the authority of its internal rules. Even more fatal is the increasing feeling of the sacredness of personal obligation arising out of contract. The partition of inheritances and execution for debt levied on land are destroying the communities—this is the formula heard nowadays everywhere in India. The brotherhood of the larger group may still cohere, but the brethren of some one family are always wishing to have their shares separately; and creditors who would have feared to intrude on the village domain now break the net of custom by stepping without ceremony into the lot of a defaulting debtor.

I now pass to the village itself, the cluster of homesteads inhabited by the members of the community. The description given by Maurer of the Teutonic Mark of the Township, as his researches have shown it to him, might here again pass for an account, so far as it goes, of an Indian village. The separate households, each despotically governed by its family chief, and never trespassed upon by the footstep of any person of different blood, are all to be found there in practice; although the theory of the absolute rights of heads of families has never, from the nature of the case, been acknowledged by the British Government. But the Indian villages have one characteristic which could only have been gathered from observation of a living society. The German writers have been struck with that complete immunity of the Teutonic homestead

from all external interference, which in this country found a later expression in the long-descended common-place that an Englishman's house is his castle. But a characteristic which in India goes along with this immunity, and to a great extent explains it, is the extraordinary secrecy of family life; a secrecy maintained, I am told, in very humble households and under difficulties which at first sight would seem insurmountable. There can be no question that, if the isolation of households in ancient societies was always accompanied by this secrecy of their interior life, much which is not quite intelligible in early legal history would be explained. It is not, for example, easy to understand the tardiness with which, in Roman society, the relations of Paterfamilias and Filius-familias became the subject of moral judgment, determining the interference of the Prætor, or again taking the form of public opinion, and so ultimately issuing in legislation. But this would be much more comprehensible if the secrets of family life were nearly as carefully guarded as they are at this moment, even in those parts of India where the peculiar Mahometan jealousy, which has sometimes been erroneously thought a universal Eastern feeling, has never yet penetrated. So, again, it is only a conjectural explanation of the scantiness of ancient systems of law as they appear in the monuments in which an attempt was made to set them formally forth, that the lawgiver

merely attempted to fill, so to speak, the interstices between the families, of which the aggregation formed the society. To the extent to which existing Indian society is a type of a primitive society, there is no doubt that any attempt of the public lawgiver to intrude on the domain reserved to the legislative and judicial power of the pater-familias causes the extremest scandal and disgust. Of all branches of law, criminal law is that which one would suppose to excite least resentment by trespassing on the forbidden limits. Yet, while many ignorant statements are constantly made about the rash disturbance of native Indian ideas by British law and administration, there is really reason to believe that a grievance most genuinely felt is the impartiality of that admirable Penal Code which was not the least achievement of Lord Macaulay's genius, and which is undoubtedly destined to serve some day as a model for the criminal law of England. I have had described to me a collection of street-songs, sung in the streets of the city which is commonly supposed to be most impatient of British rule by persons who never so much as dreamed of having their words repeated to an Englishman. They were not altogether friendly to the foreign rulers of the country, but it may be broadly laid down that they complained of nothing which might naturally have been expected to be the theme of complaint. And, without exception, they declared

that life in India had become intolerable since the English criminal laws had begun to treat women and children as if they were men.

I read to you from Mr. Morier's compendium of Von Maurer's results, a passage pointedly contrasting the independence of the Teutonic freeman in his homestead and its appurtenances with his complete subjection to customary rule when he cultivated the arable mark, or pastured his sheep and cattle in the common mark. I trust there is no presumption in my saying that in some of the most learned writers on the Mark, there seems to me too great a tendency to speak of the relations of the free chiefs of Teutonic households to one another as determined by what, for want of a more appropriate term, must be called spontaneous legislation. It is no doubt very difficult, in observing an Indian village-community, to get rid of the impression that the council of elders, which is the only Indian counterpart of the collective assembly of Teutonic villagers, occasionally legislates; and, if very strict language be employed, legislation is the only term properly expressing the invention of customary rules to meet cases which are really new. Yet, if I may trust the statements of several eminent Indian authorities, it is always the fact or the fiction that this council merely declares customary law. And indeed, while it is quite true of India that the head of the family is supposed to be chief of the household

the families within the village or township would seem to be bound together through their representative heads by just as intricate a body of customary rules as they are in respect of those parts of the village domain which answer to the Teutonic common mark and arable mark. The truth is, that nothing can be more complex than the customs of an Indian village, though in a sense they are only binding on chiefs of families. The examination of these customs, which have for their object to secure a self-acting organisation not only for the community as a whole, but for the various trades and callings which fractions of it pursue, does not fall within the scope of the present Lectures, but it is a subject full of interest. I observe that recent writers are dissatisfied with the historical theory which attributes the municipal institutions of mediæval Europe to an exclusively Roman origin, and that they are seeking to take into account the usages inherited from the conquerors of the Empire. From this point of view, the customary rules securing the interdependence and mutual responsibility of the members of an Indian village-community, or of the various subordinate groups which it may be shown to include, and the modes of speech in use among them, which are said to fluctuate between language implying an hereditary brotherhood and language implying a voluntary association, appear to be worthy of careful examination. There is reason

to believe that some European cities were originally nothing more than the township-mark of a Teutonic village-community which has subsequently grown to greatness. It is quite certain that this was the origin of the large majority of the towns which you see marked on the map of India. The village, in becoming more populous from some cause or other, has got separated from its cultivated or common domain; or the domain has been swallowed up in it; or a number of different villages have been founded close together on what was perhaps at one time unprofitable waste land, but which has become exceptionally valuable through advantages of situation. This last was the origin of the great Anglo-Indian city of Calcutta, which is really a collection of villages of very modern foundation. Here, however, it may be proper that I should state that the very greatest Indian cities had a beginning of another kind. Doubtless most of the Indian towns grew out of villages, or were originally clusters of villages, but the most famous of all grew out of camps. The Mogul Emperors and the Kings of the more powerful Hindoo dynasties differed from all known sovereigns of the Western World, not only in the singular indefiniteness of the boundaries of their dominions and in the perpetual belligerency which was its consequence, but in the vast onerousness of their claims on the industry of their subjects. From the people of a country of

which the wealth was almost exclusively agricultural, they took so large a share of the produce as to leave nothing practically to the cultivating groups except the bare means of tillage and subsistence. Nearly all the movable capital of the empire or kingdom was at once swept away to its temporary centre, which became the exclusive seat of skilled manufacture and decorative art. Every man who claimed to belong to the higher class of artificers took his loom or his tools and followed in the train of the King. This diversion of the forms of industry which depend on movable wealth to the seat of the court had its first result in the splendour of Oriental capitals. But at the same time it made it easier to change their site, regarded as they continued to be in the light of the encampment of the sovereign for the time being. Great deserted cities, often in close proximity to one another, are among the most striking and at first sight the most inexplicable of Indian spectacles. Indian cities were not, however, always destroyed by the caprice of the monarch who deserted them to found another capital. Some peculiar manufacture had sometimes so firmly established itself as to survive the desertion, and these manufacturing towns sometimes threw out colonies. Capitals, ex-capitals retaining some special art or manufacture, the colonies of such capitals or ex-capitals, villages grown to exceptional greatness, and a certain number of

towns which have sprung up round the temples built on sites of extraordinary sacredness, would go far to complete the list of Indian cities.

The Waste or common land of the Village-Community has still to be considered. One point of difference between the view taken of it in the East and that which seems at all times to have been taken in Europe, deserves to be specially noted. The members of the Teutonic community appear to have valued the village waste chiefly as pasture for their cattle, and possibly may have found it so profitable for this purpose as to have deliberately refrained from increasing that cultivated portion of it which had been turned into the arable mark. These rights of pasture vested in the commoners are those, I need scarcely tell you, which have descended but little modified to our own day in our own country; and it is only the modern improvements in the methods of agriculture which have disturbed the balance between pasture and tillage, and have thus tended to multiply Inclosure Acts. But the vast bulk of the natives of India are a grain and not a flesh-eating people. Cattle are mostly regarded by them as auxiliary to tillage. The view therefore generally taken (as I am told) of the common-land by the community is that it is that part of the village-domain which is temporarily uncultivated, but which will some time or other be cultivated and merg[redacted] the arable mark. Doubtless it is valued

for pasture, but it is more especially valued as potentially capable of tillage. The effect is to produce in the community a much stronger sense of property in common-land than at all reflects the vaguer feeling of right which, in England at all events, characterises the commoners. In the later days of the East India Company, when all its acts and omissions were very bitterly criticised, and amid the general re-opening of Indian questions after the military insurrection of 1857, much stress was laid on the great amount of waste land which official returns showed to exist in India, and it was more than hinted that better government would bring these wastes under cultivation, possibly under cotton cultivation, and even plant them with English colonists. The answer of experienced Indian functionaries was that there was no waste land at all in India. If you except certain territories which stand to India Proper much as the tracts of land at the base of the Rocky Mountains stand to the United States—as, for example, the Indo-Chinese province of Assam—the reply is substantially correct. The so-called waste lands are part of the domain of the various communities which the villagers, theoretically, are only waiting opportunity to bring under cultivation. Yet this controversy elicited an admission which is of some historical interest. It did appear that, though the native Indian Government had for the most part left the village-

communities entirely to themselves on condition of their paying the revenue assessed upon them, they nevertheless sometimes claimed (though in a vague and occasional way) some exceptional authority over the wastes; and, acting on this precedent, the British Government, at the various settlements of Land Revenue, has not seldom interfered to reduce excessive wastes and to re-apportion uncultivated land among the various communities of a district. In connection with this claim and exercise of right you will call to mind the power vested in the early English Kings to make grants of waste to individuals in severalty, first with and afterwards without the consent of the Witan; and we shall see that the much more extensive rights acquired by the lord over the waste than over any other portion of the village-domain, constitute a point of capital importance in the process known as the feudalisation of Europe.

India has nothing answering to the assembly of adult males which is so remarkable a feature of the ancient Teutonic groups, except the Council of Village Elders. It is not universally found. Villages frequently occur in which the affairs of the community are managed, its customs interpreted, and the disputes of its members decided by a single Headman, whose office is sometimes admittedly hereditary but is sometimes described as elective; the choice being generally, however, in the last case confined in practice to the

members of one particular family, with a strong preference for the eldest male of the kindred, if he be not specially disqualified. But I have good authority for saying that, in those parts of India in which the village-community is most perfect and in which there are the clearest signs of an original proprietary equality between all the families composing the group, the authority exercised elsewhere by the Headman is lodged with the Village Council. It is always viewed as a representative body, and not as a body possessing inherent authority, and, whatever be its real number, it always bears a name which recalls its ancient constitution of Five persons.

I shall have hereafter to explain that, though there are strong general resemblances between the Indian village-communities wherever they are found in anything like completeness, they prove on close inspection to be not simple but composite bodies, including a number of classes with very various rights and claims. One singular proof of this variety of interests, and at the same time of the essentially representative character of the village council, is constantly furnished, I am told, by a peculiar difficulty of the Anglo-Indian functionary when engaged in 'settling' a province in which the native condition of society has been but little broken up. The village council, if too numerous, is sure to be unmanageable; but there is great pressure from all sections of the

community to be represented in it, and it is practically hard to keep its numbers down. The evidence of the cultivators as to custom does not point, I am told, to any uniform mode of representation; but there appears to be a general admission that the members of the council should be elderly men. No example of village or of district government recalling the Teutonic assembly of free adult males has been brought to my notice. While I do not affect to give any complete explanation of this, it may be proper to remember that, though no country was so perpetually scourged with war as India before the establishment of the Pax Britannica, the people of India were never a military people. Nothing is told of them resembling that arming of an entire society which was the earliest, as it is the latest, phase of Teutonic history. No rule can be laid down of so vast a population without exceptions. The Mahratta brigands when they first rose against the Mahometans were a Hindoo Hill-tribe armed to a man; and before the province of Oudh was annexed, extreme oppression had given an universally military character to a naturally peaceful population. But, for the most part, the Indian village-communities have always submitted without resistance to oppression by monarchs surrounded by mercenary armies. The causes, therefore, which in primitive societies give importance to young men in the village assembly were wanting. The soldiers of

the community had gone abroad for mercenary service, and nothing was required of the council but experience and civil wisdom.

There is yet another feature of the Indian cultivating groups which connects them with primitive Western communities of the same kind. I have several times spoken of them as organised and self-acting. They, in fact, include a nearly complete establishment of occupations and trades for enabling them to continue their collective life without assistance from any person or body external to them. Besides the Headman or Council exercising quasi-judicial, quasi-legislative, power, they contain a village police, now recognised and paid in certain provinces by the British Government. They include several families of hereditary traders; the Blacksmith, the Harness-maker, the Shoemaker. The Brahmin is also found for the performance of ceremonies, and even the Dancing-Girl for attendance at festivities. There is invariably a Village-Accountant, an important personage among an unlettered population—so important, indeed, and so conspicuous that, according to reports current in India, the earliest English functionaries engaged in settlements of land were occasionally led by their assumption that there must be a single proprietor somewhere, to mistake the Accountant for the owner of the village, and to record him as such in the official register. But the person

practising any one of these hereditary employments is really a servant of the community as well as one of its component members. He is sometimes paid by an allowance in grain, more generally by the allotment to his family of a piece of cultivated land in hereditary possession. Whatever else he may demand for the wares he produces, is limited by a customary standard of price, very rarely departed from. It is the assignment of a definite lot in the cultivated area to particular trades, which allows us to suspect that the early Teutonic groups were similarly self-sufficing. There are several English parishes in which certain pieces of land in the common field have from time immemorial been known by the name of a particular trade; and there is often a popular belief that nobody, not following the trade, can legally be owner of the lot associated with it. And it is possible that we here have a key to the plentifulness and persistence of certain names of trades as surnames among us.

It is a remarkable fact that certain callings, extremely respectable and lucrative, do not appear in India to constitute those who follow them members of the village-community. Eminent officials have assured me that, so far as their experience extends, the Grain-dealer is never a hereditary trader incorporated with the village group, nor is he a member of the municipality in towns which have

grown out of one or more villages. The trades thus remaining outside the organic group are those which bring their goods from distant markets; and I shall try to show the significance of this fact hereafter.

There are in Central and Southern India certain villages to which a class of persons is hereditarily attached in such a manner as to show most unmistakeably that they form no part of the natural and organic aggregate to which the bulk of the villagers belong. These persons are looked upon as essentially impure; they never enter the village, or only enter reserved portions of it; and their touch is avoided as contaminating. It is difficult to read or listen to the accounts given of them without having the mind carried to those singular races or classes which, in certain European countries, were supposed almost to our own day to transmit from father to son the taint of a mysterious uncleanness. Yet these Indian 'outsiders,' as they have been called (by Sir H. B. Frere in 'The Church and the Age,' p. 357), to avoid using the word 'outcast,' which has a different meaning, bear extremely plain marks of their origin. Though they are not included in the village, they are an appendage solidly connected with it; they have definite village duties, one of which is the settlement of boundaries, on which their authority is allowed to be conclusive. They evidently represent

a population of alien blood, whose lands have been occupied by the colonists or invaders forming the community. Everybody who has used his eyes in India will be on his guard against certain extravagances of the modern theory of Race, and will be slow to believe that identity of language and identity of religion necessarily imply identity of ethnical origin. The wonderful differences of external aspect which are readily perceived between natives of Indian provinces speaking the same language, and the great deviation from what is regarded as the Aryan type of form and feature observable among populations whose speech is a near derivative from Sanscrit, have their most reasonable explanation in the power of absorption which the village group may from many indications be inferred to have possessed in the earlier stages of development. But the faculty of taking in strangers from without is one which it loses in time, and there were always probably some materials too obstinately and obtrusively foreign to be completely absorbed. Under this last head, the 'outsiders' of the Southern villages apparently fall.

LECTURE V.

THE PROCESS OF FEUDALISATION.

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LECTURE V.

THE PROCESS OF FEUDALISATION.

THE student of legal antiquities who has once convinced himself that the soil of the greatest part of Europe was formerly owned and tilled by proprietary groups, of substantially the same character and composition as those which are still found in the only parts of Asia which are open to sustained and careful observation, has his interest immediately drawn to what, in truth, is the great problem of legal history. This is the question of the process by which the primitive mode of enjoyment was converted into the agrarian system, out of which immediately grew the land-law prevailing in all Western Continental Europe before the first French Revolution, and from which is demonstrably descended our own existing real-property law. For this newer system no name has come into general use except Feudalism, a word which has the defect of calling attention to one set only of its characteristic incidents. We cannot reasonably doubt that one partial explanation of its origin is, so far as it goes, correct. It arose from or was greatly

influenced by the Benefices, grants of Roman provincial land by the chieftains of the tribes which overran the Roman Empire ; such grants being conferred on their associates upon certain conditions, of which the commonest was military service. There is also tolerably universal agreement that somewhere in Roman law (though *where*, all are not agreed) are to be found the rules which determined the nature of these beneficiary holdings. This may be called the theory of the official origin of feudalism, the enjoyment of land being coupled with the discharge of certain definite duties ; and there are some who complete the theory by asserting that among the Teutonic races, at all events, there was an ineradicable tendency in all offices to become hereditary, and that thus the Benefices, which at first were held for life, became at last descendible from father to son.

There is no question, as I said, that this account is more than probable, and that the Benefices either began or hastened the changes which led ultimately to feudalism. Yet I think that nobody whose mind has dwelt on the explanation, has brought himself to regard it as complete. It does not tell us how the Benefices came to have so extraordinary a historical fortune. It does not account for the early, if partial, feudalisation of countries like Germany and England, where the cultivated soil was in the hands of free and fully organised communities, and was not, like the

land of Italy or Gaul, at the disposal of a conquering king—where the royal or national grants which resembled the Benefices were probably made out of waste land—and where the influence of Roman law was feebly felt or not at all.

The feudalisation of any one country in Europe must be conceived as a process including a long series of political, administrative, and judicial changes; and there is some difficulty in confining our discussion of it to changes in the condition of property which belong more properly to this department of study. But I think we may limit our consideration of the subject by looking at it in this way. If we begin with modern English real-property law, and, by the help of its records and of the statutes affecting it, trace its history backwards, we come upon a period at which the soil of England was occupied and tilled by separate proprietary societies. Each of these societies is, or bears the marks of having been, a compact and organically complete assemblage of men, occupying a definite area of land. Thus far it resembles the old cultivating communities, but it differs from them in being held together by a variety of subordinate relations to a feudal chief, single or corporate, the Lord. I will call the new group the Manorial group, and though my words must not be taken as strictly correct, I will say that a group of tenants, autocratically organised and governed, has succeeded a

group of households of which the organisation and government were democratic. The new group, as known to our law, is often in a state of dissolution, but, where it is perfect, it consists of a number of persons holding land of the Lord by free tenures, and of a number of persons holding land of the Lord by tenures capable of being shown to have been, in their origin, servile—the authority of the Lord being exercised over both classes, although in different ways, through the agency of a peculiar tribunal, the Court Baron. The lands held by the first description of tenants are technically known as the Tenemental lands; those held by the second class constitute the Lord's Domain. Both kinds of land are essential to the completeness of the Manorial group. If there are not Tenemental lands to supply a certain minimum number of free tenants to attend the Court Baron, and, according to the legal theory, to sit with the lord as its judges, the Court Baron can no longer in strictness be held; if it be continued under such circumstances, as it often was in practice, it can only be upheld as a Customary Manorial Court, sitting for the assessment and receipt of customary dues from the tenants of the Domain. On the other hand, if there be no Domain, or if it be parted with, the authority of the Lord over the free tenants is no longer Manorial; it becomes a Seignory in gross, or mere Lordship.

Since much of the public waste land of our country is known to have passed by national or royal grant to individuals or corporations, who, in all probability, brought it extensively under cultivation from the first by servile labour, it cannot be supposed that each of the new Manorial groups takes the place of a Village group which at some time or other consisted of free allodial proprietors. Still, we may accept the belief of the best authorities that over a great part of England there has been a true succession of one group to the other. Comparing, then, the two, let us ask what are the specific changes which have taken place? The first, and far the most important of all, is that, in England as everywhere in Western Europe, the waste or common-land of the community has become the lord's waste. It is still ancillary to the Tenemental lands; the free tenants of the lord, whom we may provisionally take to represent the freemen of the village-community, retain all their ascertained rights of pasture and gathering firewood, and in some cases similar rights have been acquired by other classes; but, subject to all ascertained rights, the waste belongs, actually or potentially, to the lord's domain. The lord's 'right of approvement,' affirmed by the Statute of Merton, and extended and confirmed by subsequent statutes, permits him to enclose and appropriate so much of the waste as is not wanted to satisfy other existing rights; nor can it be doubted

that he largely exercises this right, reclaiming part of the waste for himself by his personal dependants and adding it to whatever share may have belonged to him from the first in the cultivated land of the community, and colonising other portions of it with settlements of his villeins who are on their way to become copyholders. The legal theory has altogether departed from the primitive view; the waste is now the lord's waste; the commoners are for the most part assumed to have acquired their rights by sufferance of the lord, and there is a visible tendency in courts and text-writers to speak of the lord's rights, not only as superior to those of the commoners, but as being in fact of greater antiquity.

When we pass from the waste to the grass lands which were intermediate between the common land and the cultivated area, we find many varieties in the degree of authority acquired by the lord. The customs of manors differ greatly on the point. Sometimes, the lord encloses for his own benefit from Candlemas to Midsummer or Lammas, and the common right belongs during the rest of the year to a class of burgesses, or to the householders of a village, or to the persons inhabiting certain ancient tenements. Sometimes, the lord only regulates the inclosure, and determines the time of setting up and removing the fences. Sometimes, other persons enclose, and the lord has the grass when the several

enjoyment comes to an end. Sometimes, his right of pasture extends to the baulks of turf which separate the common arable fields; and probably there is no manorial right which in later times has been more bitterly resented than this, since it is practically fatal to the cultivation of green crops in the arable soil.

Leaving the meadows and turning to the lands under regular tillage, we cannot doubt that the free holders of the Tenemental lands correspond in the main to the free heads of households composing the old village-community. The assumption has often been made, and it appears to be borne out by the facts which can be established as to the common fields still open or comparatively lately enclosed. The tenure of a certain number of these fields is freehold; they are parcelled out, or may be shown to have been in the last century parcelled out, among many different owners; they are nearly always distributed into three strips, and some of them are even at this hour cultivated according to methods of tillage which are stamped by their very rudeness as coming down from a remote antiquity. They appear to be the lands of a class which has never ceased to be free, and they are divided and cultivated exactly as the arable mark of a Teutonic township can be inferred, by a large induction, to have been divided and tilled. But, on the other hand, many large tracts of inter-

mixed land are still, or were till their recent enfranchisement, copyhold of particular manors, and some of them are held by the intermediate tenure, known as customary freehold, which is confined by the legal theory to lands which once formed part of the King's Domain. I have not been able to ascertain the proportion of common lands held by these base tenures to freehold lands of the same kind, but there is no doubt that much commonable or intermixed land is found, which is not freehold. Since the descent of copyhold and customary freehold tenures from the holdings of servile classes appears to be well established, the frequent occurrence of intermixed lands of this nature seems to bear out the inference suggested by Sir H. Ellis's enumeration of the conditions of men referred to in Domesday Book, that, during the long process of feudalisation, some of the free villagers sank to the status, almost certainly not a uniform status, which was implied in villenage. (See also Mr. Freeman's remark, 'Hist. Norm. Conq.' i. 97.) But evidence, supplied from quarters so wide apart as British India and the English settlements in North America, leads me to think that, at a time when a system of customary tillage widely prevailed, assemblages of people planted on waste land would be likely to copy the system literally; and I conjecture that parts of the great wastes undoubtedly reclaimed by the exercise of the right afterwards called the

lord's 'right of approvement' were settled by servile colonies modelled on the ancient Teutonic township.

The bond which kept the Manorial group together was evidently the Manorial Court, presided over by the lord or his representative. Under the name of Manorial Court three courts are usually included, which legal theory keeps apart, the Court Leet, the Court Baron, and the Customary Court of the Manor. I think there cannot be reasonable doubt of the legitimate descent of all three from the assembly of the Township. Besides the wide criminal and civil jurisdiction which belonged to them, and which, though it has been partly abolished, has chiefly lost its importance through insensible decay, they long continued in the exercise of administrative or regulative powers which are scarcely distinguishable from legislation. Other vestiges of powers exerted by the collective body of free owners at a time when the conceptions of legislative and judicial authority had not yet been separated, remained in the functions of the Leet Jury; in the right asserted for the free tenants of sitting as Judges in the Court Baron; and in the election of various petty officers. It is true that, as regards one of these Courts, the legal theory of its character is to a certain extent inconsistent with the pedigree I have claimed for it. The lawyers have always contended that the Court Leet only existed through the King's

grant, express or implied; and in pursuance of the same doctrine they have laid down that, whereas the lord might himself sit in the Court Baron, he must have a person of competent legal learning to represent him in the Court Leet. But this only proves that the Court Leet, which was entrusted with the examination of the Frankpledge, had more public importance than the other Manorial Courts, and was therefore more distinctly brought under the assumption which had been gradually forming itself, that royal authority is the fountain of all justice. Even in the last extremity of decline, the Manorial Courts have not wholly ceased to be regarded as the tie which connects the common interests of a definite group of persons engaged in the cultivation of the soil. Marshall ('Rural Economy of Yorkshire,' i. 27) mentions the remarkable fact that these Courts were sometimes kept up at the beginning of the century by the voluntary consent of the neighbourhood in certain districts where, from the disappearance of the servile tenures which had enabled the Customary Courts to be continued, the right to hold them had been forfeited. The manorial group still sufficiently cohered for it to be felt that some common authority was required to regulate such matters as the repair of minor roads, the cleansing of rivulets, the ascertainment of the sufficiency of ring-fences, the assessment of the damages of impounded cattle, the removal of nuisances, and the stocking of commons.

On the whole, the comparison of the Village group with the English group which I have called Manorial rather than Feudal, suggests the following general observations. Wherever that collective ownership of land which was a universal phenomenon in primitive societies has dissolved, or gone far to dissolve, into individual property, the individual rights thus formed have been but slightly affected by the process of feudalisation. If there are reasons for thinking that some free village societies fell during the process into the predial condition of villenage—whatever that condition may really have implied—a compensating process began at some unknown date, under which the base tenant made a steady approach to the level of the freeholder. Even rights which savoured of the collective stage of property were maintained comparatively intact, provided that they were ascertained: such as rights of pasture on the waste and rights of several or of common enjoyment (as the case might be) in the grass land. The encroachments of the lord were in proportion to the want of certainty in the rights of the community. Into the grass land he intruded more than into the arable land; into the waste much more than into either. The conclusion suggested to my mind is that, in succeeding to the legislative power of the old community, he was enabled to appropriate to himself such of its rights as were not immediately valuable, and which, in the event of their becoming valuable, required legislative

adjustment to settle the mode of enjoying them. Let me add that the general truth of my description of the character of the change which somehow took place, is perhaps rendered antecedently more probable by the comparison of a mature, but non-feudal, body of jurisprudence, like the Roman law, with any deeply feudalised legal system. You will remember the class of enjoyable objects which the Roman lawyers call *res nullius*, *res publici usûs*, *res omnium* or *universorum*; these it reserves to the entire community, or confers on the first taker. But, under feudalised law, nearly all these objects which are capable of several enjoyment belong to the lord of the manor, or to the king. Even Prize of War, the most significant of the class, belongs theoretically to the sovereign in the first instance. By a very singular anomaly, which has had important practical results, Game is not strictly private property under English law; but the doctrine on the subject is traceable to the later influence of the Roman law.

There must be a considerable element of conjecture in any account which may be given of a series of changes which took place for the most part in remote antiquity, and which probably were far from uniform either in character or in rate of advance. It happens, however, that the vestiges of the earlier stages of the process of feudalisation are more discernible in Germany than elsewhere, both in docu-

mentary records and on the face of the land; owing in part no doubt to the comparatively feeble action of that superior and central authority which has obliterated or obscured so much in our own country. A whole school of writers, among whom Von Maurer has the first place, has employed itself in restoring and interpreting these traces of the Past. How did the Manor rise out of the Mark?—this is their way of stating the problem. What were the causes of indigenous growth which, independently of grants of land by royal or national authority, were leading to a suzerainty or superiority of one cultivating community over another, or of one family over the rest of the families composing the village-community? The great cause in the view of these writers was the exceeding quarrelsomeness of these little societies, and the consequent frequency of intertribal war. One community conquers another, and the spoil of war is generally the common mark or waste of the worsted community. Either the conquerors appropriate and colonise part of the waste so taken, or they take the whole domain and restore it to be held in dependence on the victor-society. The change from one of these systems to another occurred, you will remember, in Roman history, and constitutes an epoch in the development of the Roman Law of Property. The effect of the first system on the Teutonic communities was inequality of property; since the common land

appropriated and occupied does not seem to have been equally divided, but a certain preference was given to the members of the successful community who had most effectually contributed to the victory. Under the second system, when its land was restored to the conquered society, the superiority over it which remained to the victor, bore the strongest analogy to a suzerainty or lordship. Such a suzerainty was not, however, exclusively created by success in war. Sometimes a community possessed of common land exceptionally extensive or exceptionally fertile would send colonies of families to parts of it. Each of these new communities would receive a new arable mark, but such of the land as remained unappropriated would still be the common land of all the townships. At the head of this sort of confederacy there would, however, be the original mother community from which the colonists proceeded, and there seems no doubt that in such a state of things she claimed a superiority or suzerainty over all the younger townships.

But, even if we had the fullest evidence of the growth of suzerainties in this inchoate shape, we should still have advanced a very little way in tracing the transmutation of the village system into the manorial system, if it were not for another phenomenon to which Landau has more particularly called attention. The Teutonic communities, though their organisation (if modern language must be employed)

can only be described as democratic, appear nevertheless to have generally had an abiding tradition that in some one family, or in some families, the blood which ran in the veins of all the freemen was purest; probably because the direct descent of such family or families from a common ancestor was remembered or believed in. From the members of these families, the leader for a military expedition would as a rule be chosen; but as in this stage of thought the different varieties of power were not distinguished from one another, the power acquired by the chieftain would be a combination of political, military, and judicial power. The choice of the leader would in great emergencies be a true election, but on less serious occasions would tend to become an acquiescence in the direction of the eldest male agnate of the family which had the primacy of the township. Similarly the power which had at first been more military than anything else, would in more peaceful times tend rather to assume a political and judicial form. The leader thus taken from the privileged family would have the largest share of the lands appropriated from conquered village-societies; and there is ground for supposing that he was sometimes rewarded by an exceptionally large share of the common land belonging to the society which he had headed. Everything in fact which disturbed the peaceful order of the village system led to the aggrandisement of the leading

family and of its chief. Among the privileges which he obtained was one of which the importance did not show itself till much later. He became powerful enough in his own township to sever his own plot of land from the rest, and, if he thought fit, to enclose it; and thus to break up or enfeeble that system of common cultivation under rules of obligatory custom which depended mainly on the concurrence of all the villagers.

There were therefore, in the cultivating communities of the German and Scandinavian races, causes at work which were leading to inequality of property in land. There were causes at work which were leading to the establishment of superiorities or suzerainties of one township over another. There were causes at work which tended to place the benefits of an unequal proprietary system and the enjoyment of these suzerainties in the hands of particular families, and consequently of their chiefs for the time being. Here you have all the elements of the system we are compelled to call feudal. But the system in its ultimate development was the result of a double set of influences. One set, which I have been describing, were of primitive growth. Another showed themselves when powerful Teutonic monarchies began to be formed, and consisted in grants of national waste land or of the soil of conquered provinces. Doubtless some of the grantees were chiefs of families already

risen to power under indigenous Teutonic conditions; but in any case a Beneficiary would be a chieftain of a peculiarly powerful class. The cultivators of his land would either be persons settled on it by himself, or they would be vanquished provincials who had no rights which he did not choose to recognise or concede. It is not, therefore, surprising that there should have been a completer constitution of feudalism in the countries which at the time of conquest were filled with Romanised populations. The mould would be Teutonic, but the materials would be unusually plastic, and here would more especially come into play the influence of Roman law, giving precision to relations which under purely Teutonic social conditions may have been in a high degree vague and indefinite. It is well known that this systematic feudalism reacted upon the more purely Teutonic societies and gave an impulse to changes which were elsewhere proceeding at a slower pace.

I have very briefly summarised the results of a very long and laborious enquiry, and only so far as is necessary for my immediate purpose. Merely remarking that I can see little or nothing in the conclusions of these eminent German writers which is out of harmony with the account given by English scholars of the parallel phenomena of change manifested in England before the Conquest, I proceed to ask, following the scheme of these Lectures, whether

the experience of Englishmen in India throws any light or has any bearing upon the questions which have been occupying us? It is not too much to say that the phenomena observed in the East, and those established in the West by historical research, illustrate one another at every point. In India these dry bones live. Not only, as I have told you, is the Village-Community the basis of British administration in those provinces in which the art of government has to be practised with skill and caution, but a number of controversies turning on the mode of transition from the village system to what I have called the manorial system are as earnestly, and sometimes even as violently, debated by our countrymen in the East as are the great aspects of politics among ourselves. All Indian disputes take, I should explain, a historical or antiquarian shape. The assumption universally made is that the country must be governed in harmony with the established usages of the natives, and each administrative school has therefore to justify its opinions by showing that the principles to which it adheres are found in some sense or other to underlie the known customary law of India. The extravagance of partisanship which here shows itself in unqualified assertion of the universal applicability of general propositions has its Indian counterpart in unqualified assertion of the universal existence of particular customs. The Indian controversy is, how-

ever, a controversy about facts which, though they are more complex than the disputants suppose, are nevertheless much simpler than the material of English political controversy; and the results are therefore proportionately more instructive to the by-stander who has entire sympathy with neither party.

Let us suppose a province annexed for the first time to the British Indian Empire. The first civil act of the new government is always to effect a settlement of the land revenue; that is, to determine the amount of that relatively large share of the produce of the soil, or of its value, which is demanded by the sovereign in all Oriental States, and out of which all the main expenses of government are defrayed. Among the many questions upon which a decision must be had, the one of most practical importance is, 'Who shall be settled with?'—with whom shall the settlement be made? What persons, what bodies, what groups, shall be held responsible to the British Government for its land revenue? What practically has to be determined is the unit of society for agrarian purposes; and you find that, in determining it, you determine everything, and give its character finally to the entire political and social constitution of the province. You are at once compelled to confer on the selected class powers co-extensive with its duties to the sovereign. Not that the assumption is ever made that new proprietary powers are conferred on it,

but what are supposed to be its rights in relation to all other classes are defined; and in the vague and floating order of primitive societies, the mere definition of a right immensely increases its strength. As a matter of fact, it is found that all agrarian rights, whether superior or subordinate to those of the person held responsible to Government, have a steady tendency to decay. I will not ask you to remember the technical names of the various classes of persons 'settled with' in different parts of India—Zemindars, Talukdars, Lumberdars—names which doubtless sound uncouth, and which, in fact, have not an identical meaning throughout the country—but I dwell on the fact that the various interests in the soil which these names symbolise are seen to grow at the expense of all others. Do you, on entering on the settlement of a new province, find that a peasant proprietary has been displaced by an oligarchy of vigorous usurpers, and do you think it expedient to take the government dues from the once oppressed yeomen? The result is the immediate decline, and consequently bitter discontent, of the class above them, who find themselves sinking to the footing of mere annuitants on the land. Such was the land settlement of Oudh, which was shattered to pieces by the Sepoy mutiny of 1857, and which greatly affected its course. Do you, reversing this policy, arrange that the superior holder shall be answerable to Government? You find that you have

created a landed aristocracy which has no parallel in wealth or power except the proprietors of English soil. Of this nature is the more modern settlement of the province of Oudh, only recently consummated; and such will ultimately be the position of the Talukdars, or Barons, among whom its soil has been divided. Do you adopt a policy different from either of those which I have indicated and make your arrangements with the representative of the village-community? You find that you have arrested a process of change which was steadily proceeding. You have given to this peculiar proprietary group a vitality which it was losing, and a stiffness to the relations of the various classes composing it which they never had before.

It would be a mere conceit to try to establish any close analogy between the Teutonic Kings and the British government of India. Yet, so much as this is true and instructive. The only owner of the soil of India with whom the English Government has any relations, is, in its eyes, a mere functionary. It chooses him where it pleases, and exacts from him services, chiefly pecuniary, but to a certain small extent personal. It is found, however, that when an official appointed by a powerful government acts upon the loose constitution of a primitive society he crushes down all other classes and exalts that to which he himself belongs. But for recent legislation this

process would have gone to any length in India, and would have assuredly affected many other provinces than those which were its immediate theatre. It may, at least, be said that by observing it we gain a clearer conception of the effect of beneficiary gifts on the general tenure of land, and that we better understand the enormous power acquired by the chieftains who rendered immediate services to the Teutonic kings.

The English in India appear to have started with the assumption of the Mahometans that the sovereign might lawfully select anybody he pleased as the collector of his revenue; but they soon accepted the principle that the class to be 'settled with' was the class best entitled to be regarded as having rights of property in the soil. At a later date they discovered that, even when this class was determined, they had to decide what it was that proprietary rights over Indian land implied, and what powers they carried with them. No questions fuller of inherent difficulties were ever proposed for solution. As regards the first of them, the functionaries administering India might, with some eminent exceptions, but still not unfairly, be distributed into two great schools—the partisans of the theory that the soil belongs to the peasantry either as individuals or as organised in groups; and the partisans of the theory that ownership of the soil ought to be, and but for British influence would be, everywhere in India vested in some sort of native aristocracy. As regards the second

question, the Indian officials are much more exactly divided into those who contend that the highest right of property acknowledged to exist over the soil carries with it the same powers which attach to an English owner in fee-simple of the present day, and into those who are of opinion that, if these powers are to square with native idea and custom, they must be more or less limited and controlled. The controversies on these two points are the most vehemently debated of Indian disputes; and none ever presented greater difficulties to the person who tries to form an opinion on their merits, not from his own knowledge but upon the evidence supplied to him by others. He finds men of the utmost experience, of trained power of observation, and of the most unquestionable good faith, stating precisely opposite conclusions with precisely equal positiveness. But if he avail himself of the advantage given him by the parallel facts of European tenure, he will, perhaps, venture to have an opinion, and to think that in these, as in many other fierce disputes, both sides are right and both sides are wrong.

There is no doubt that the first point at issue was much obscured, and attention diverted to irrelevant matter, by the unlucky experiment tried at the end of the last century by Lord Cornwallis. A province, like Bengal Proper, where the village system had fallen to pieces of itself, was the proper field for the creation of a peasant proprietary; but Lord Cornwallis

turned it into a country of great estates, and was compelled to take his landlords from the tax-gatherers of his worthless predecessors. The political valuelessness of the proprietary thus created, its failure to obtain any wholesome influence over the peasantry, and its oppression of all inferior holders, led not only to distrust of the economical principles implied in its establishment, but to a sort of reluctance to believe in the existence of any naturally privileged class in the provinces subsequently acquired and examined. The most distinguished public servants of that day have left much on record which implies an opinion that no ownership of Indian land was discoverable, except that of the village-communities, subject to the dominion of the State.

But in fact it appears that, of all the landmarks on the line of movement traced by German and English scholars from the Village group to the Manorial group, there is not one which may not be met with in India, saving always the extreme points at either end. I have not had described to me any village-community under the unmodified collective government of the heads of households, but there are those who think they find the vestiges of the original constitution in a sort of democratic spirit and habit of free criticism which prevail even when the government has passed to an hereditary officer. If any thoroughly authenticated example could be produced

of a community exercising absolute liberty of choice in electing its Headman, it would point still more significantly to an unmodified original equality; but the preference alleged to be invariably shown to the members of particular families appears to show that these elections belong really to the phenomena of hereditary succession. It is not, however, disputed that villages are found in great numbers in which the government is lodged with a council, neither claiming to be nor regarded as being anything more than a representation of the entire cultivating body The instances, however, in which the authority has passed to some particular family or families are extremely numerous. Sometimes the office of Headman belongs absolutely to the head of a particular family; sometimes it belongs to him primarily, but he may be set aside for incapacity or physical blemish; sometimes there is a power of choosing him limited to an election between the members of one or more privileged households. The powers which he enjoys—or which it perhaps should be said, he would enjoy under native conditions of society—are also very various. But the judicial power of mediating in disputes and of interpreting customs appears to be certainly vested in him, together with the duty of keeping order; and, independently of the functions which he discharges with the consent of his neighbours, the British Government often expressly

confides to him a certain amount of regular jurisdiction and of regular authority in matters of police.

There is no question that many of the families whom the English have recognised as owners of villages were privileged families enjoying the primacy of the township; but the widest difference of opinion has prevailed as to the nature and origin of the rights claimed by certain families for their chiefs over whole tracts of country, embracing the domain of several village-communities. It has been strongly contended on one side that these great proprietors are nothing but the descendants of farmers of the revenue under Native Governments; on the other it is asserted that in some cases at all events they were Chieftains of Clans who were selected by preference to represent the Royal or Imperial native government in districts in which they had an hereditary influence. There appears to me reasonable evidence that this last theory is true of certain localities in India. Clan society is also in Europe the Celtic form of the family organisation of society; and, for myself, I have great difficulty in conceiving the origin of customary law otherwise than by assuming the former existence of larger groups, under patriarchal chieftains, which at a later date dissolved into the independent collections of families forming the cultivating communities of the Teutonic (including the Scandinavian) races and of the Hindoos.

If it be taken for granted that the English in India

were bound to recognise rights of property somewhere, their selection of the persons in whom these rights should vest does not seem to have been as absurd as the adherents of one Indian school are in the habit of hinting, if not of asserting. Claims to some sort of superior right over land in fact existed which corresponded to every single stage through which the conception of proprietorship has passed in the Western world, excepting only the later stages. The variety of these claims was practically infinite, and not only did not diminish, but greatly increased, as native customs and ideas were more accurately examined. Even when the village-communities were allowed to be in some sense the proprietors of the land which they tilled, they proved on careful inspection not to be simple groups, but highly composite bodies, composed of several sections with conflicting and occasionally with irreconcilable claims. The English officials solved a problem of almost hopeless perplexity by registering all the owners of superior rights as landowners, their conception of ownership being roughly taken from their own country; but the fundamental question very soon revived under another form in the shape of the second issue disputed between the Indian administrative schools, which is, whether proprietorship in India is to be taken to be the same assemblage of powers which constitutes the modern English ownership of land in fee-simple.

It seems to me that the error of the school which asserts the existence of strong proprietary rights in India lies much less in merely making this assertion than in assuming the existence of a perfect analogy between rights of property as understood in India and as understood in this country. The presumption is strongly against the reality of any such correspondence. The rights of property are, in the eye of the jurist, a bundle of powers, capable of being mentally contemplated apart from one another and capable of being separately enjoyed. The historical enquirer can also, whenever there are materials for a history of the past, trace the gradual growth of the conception of absolute property in land. That conception appears to me, for reasons which I shall afterwards assign, to have grown out of the ownership of the lord in that portion of his domain which he cultivated by his immediate personal dependants, and therefore to be a late and gradually matured fruit of the feudalisation of Europe. A process closely resembling feudalisation was undoubtedly once at work in India; there are Indian phenomena answering to the phenomena of nascent absolute ownership in England and Europe; but then these Indian phenomena, instead of succeeding one another, are all found existing together at the present moment. The feudalisation of India, if so it may be called, was never in fact completed. The characteristic signs of its consummation are wanting. It may

young men to serve in their wars, but did not otherwise meddle with the cultivating societies. This was doubtless the great cause of their irregular development. Intertribal wars soon gave way to the wars of great kings leading mercenary armies, but these monarchs, with few and doubtful exceptions, neither legislated nor centralised. The village-communities were left to modify themselves separately in their own way.

This subject is one of much practical importance, and I propose to treat of the more difficult problems which it raises in the next Lecture; at present I will content myself with repeating that there seems to me the heaviest presumption against the existence in any part of India of a form of ownership conferring the exact rights on the proprietor which are given by the present English ownership in fee-simple. There are now, however, a vast number of vested rights in the country, fully recognised by the English Government, which assume the identity of Indian and English proprietorship, and neither justice nor policy permits them to be disturbed. Moreover it is abstractedly possible that further observation of particular localities by accurate observers may, so far as regards those localities, rebut the presumption of which I have spoken, provided that the enquirer be acquainted with the parallel phenomena which belong to European legal history, and provided that he possess

the faculty, not very common among us, of distinguishing the rudimentary stages of legal thought from its maturity. The way in which, among the unlettered members of a primitive society, law and morality run into one another ought especially to be studied. The subordinate holder who in India states that the superior holder has the power to do a certain act, but that he ought not to do it, does not make an admission; he raises a question of the utmost difficulty.

It has been usual to speak of the feudalisation of Western Europe as if it had been an unmixed evil, and there is but too much reason to believe that it was accompanied in its course by a great amount of human suffering. But there are some facts of Indian experience which may lead us to think that the advantage of some of the economical and juridical results which it produced has been underrated. If the process indeed had really consisted, as some of the enthusiasts for its repetition in India appear to suppose that it did, merely in the superposition of the lord over the free owners of land, with power to demand such services or dues as he pleased and to vary his demands at pleasure, very little indeed could be said for it. But this picture of it is certainly untrue of our own country. We are not at liberty to assume that the obligations incurred by the free owner of land who *commended* himself to a lord were other than, within certain limits, fixed and

definite services; and the one distinguishing characteristic which the English feudists discover in that free Socage tenure for which the English villagers most probably exchanged their allodial ownership is certainty, regularity and permanence of service. The great novelties which the transition from one form of property to another produced were, the new authority over the waste which the lord acquired (and which was connected with the transfer to him of the half judicial, half legislative, powers of the collective community) and the emancipation of the lord within his own domains from the fetters of obligatory agricultural custom. Now Europe was then full of great wastes, and the urgent business in hand was to reclaim them. Large forests were to be felled, and wide tracts of untilled land had to be brought under cultivation. In England, inexorably confined within natural boundaries, there pressed with increasing force the necessity for adopting the methods of agriculture which were fitted to augment the total supply of food for a growing population. But for this work society organised in village-communities is but little adapted. The Indian administrators who regard the cultivating groups with most favour, contend that they secure a large amount of comfort and happiness for the families included within them, that their industry is generally, and that their skill is occasionally, meritorious. But their admirers certainly do not claim for them that

they readily adopt new crops and new modes of tillage, and it is often admitted that they are grudging and improvident owners of their waste-land. The British Government, as I before stated, has applied a remedy to this last defect by acting on the right to curtail excessive wastes which it inherited from its predecessors; and of late years it has done its utmost to extend and improve the cultivation of one great staple, Cotton—amid difficulties which seem to be very imperfectly understood by those who suppose that in order to obtain the sowing of a new crop, or the sowing of an old crop in a new way, from a peasant in bondage to hereditary custom, it is enough to prove to him that it is very likely to be profitable. There is Indian evidence that the forms of property imitated from modern English examples have a value of their own, when reclamation has to be conducted on a large scale, or novelties in agriculture have to be introduced. The Zemindars of Lower Bengal, the landed proprietary established by Lord Cornwallis, have the worst reputation as landlords, and appear to have frequently deserved it; but the grants of land originally made to them included great uncultivated tracts, and at the time when their power over subordinate holders was least limited they brought large areas of waste-land under tillage by the colonies of peasants which they planted there. The proprietorship conferred on them has also much to do

with the introduction into Lower Bengal, nearly alone among Indian provinces, of new and vast agricultural industries, which, if they had been placed under timely regulation (which unfortunately they were not) would have added as much to the comfort of the people as they have added to the wealth of the country.

It appears therefore to me to be highly probable that the autocratically governed manorial group is better suited than the village group for bringing under cultivation a country in which waste-lands are extensive So also does it seem to me likely to have been at all times more tolerant of agricultural novelties. It is a serious error to suppose that the non-feudal forms of property which characterised the cultivating communities had any real resemblance to the absolute property of our own day. The land was free only in the sense of being free from feudal services, but it was enslaved to custom. An intricate net of usage bound down the allodial owner, as it now binds the Indian peasant, to a fixed routine of cultivation. It can hardly be said that in England or Germany these usages had ceased to exercise a deadening influence even within living memory, since very recent writers in both countries complain of the bad agriculture, perpetuated by custom in the open common fields. The famous movement against Inclosures under the Tudor reigns was certainly in

part provoked by inclosures of plots in the three common fields made with the intention of breaking the custom and extending the systematic cultivation of grasses; and it is curious to find the witnesses examined before the Select Committee of 1844 using precisely the same language which was employed by the writers who in the sixteenth century took the unpopular side, and declaring that the value and produce of the intermixed lands might be very greatly increased if the owner, instead of having one plot in each field, had three plots thrown together in one field and dealt with them as he pleased. As I said before, it seems to me a plausible conjecture that our absolute form of property is really descended from the proprietorship of the lord in the domain which—besides planting it with the settlements of 'unfree' families—he tilled, when it was close to his castle or manor-house, by his own dependants under his own eye. He was free from the agricultural customs which shackled those below him, and the services exacted from above were not of a kind to affect his management of the land which he kept in his hands. The English settlers on the New England coast did not, as I shall point out, at first adopt this form of property, but they did so very shortly, and we unquestionably owe to it such an achievement as the cultivation of the soil of North America.

If, however, a society organised in groups on the

primitive model is ineffective for Production, so also if left to develop itself solely under primitive influences it fails to secure any considerable improvement in Distribution. Although it is hardly possible to avoid speaking of the Western village groups as in one stage democratically governed, they were really oligarchies, as the Eastern communities always tend to become. These little societies had doubtless anciently a power of absorption, when men were of more value than land. But this they lose in time. There is plenty of evidence that, when Western Europe was undergoing feudalisation, it was full of enthralled classes; and I imagine that the authority acquired by the feudal chief over the waste was much more of an advantage than the contrary to these classes, whom he planted largely there in colonies which have probably been sometimes mistaken for assemblages of originally free villagers. The status of the slave is always deplorable; the status of the predial slave is often worse than that of the personal or household slave; but the lowest depth of miserable subjection is reached when the person enthralled to the land is at the mercy of peasants, whether they exercise their powers singly or in communities.

Whether the Indian village-communities had wholly lost their capacity for the absorption of strangers when the British dominion began, is a

point on which I have heard several contradictory opinions; but it is beyond doubt that the influence of the British Government, which in this respect is nothing more than the ordinary influence of settled authority, has tended steadily to turn the communities into close corporations. The definition of rights which it has effected through its various judicial agencies—the process of law by which it punishes violations of right—above all the money value which it has given to all rights by the security which it has established from one end of India to another—have all helped to make the classes in possession of vested rights cling to them with daily increasing tenacity. To a certain small extent this indirect and unintended process of shutting the door to the acquisition of new communal rights has been counteracted by a rough rule introduced by the English, and lately engrafted on the written law, under which the cultivator of the soil who has been in possession of it for a period of years is in some parts of India protected against a few of the extreme powers which attach to ownership of the modern English type. But the rule is now in some discredit, and the sphere of its operation has of late been much curtailed. And my own opinion (which I shall state more at length in the next Lecture) is, that even if the utmost effect were given to it, it would not make up for some of the inequalities of distribution between

classes actually included in the village group which have made their way into it through the influence of economical ideas originating in the West. On the whole the conclusion which I have arrived at concerning the village-communities is that, during the primitive struggle for existence they were expansive and elastic bodies, and these properties may be perpetuated in them for any time by bad government. But tolerably good government takes away their absorptive power by its indirect effects, and can only restore it by direct interposition.

It was part of my design to append to these Lectures an epitome of the work in which Professor Nasse has attempted to connect the actual condition of landed property in much of England at the end of the last century as shown in the various publications of Marshall, with the early English forms of tenure and cultivation as known to us through the labours of English and German scholars. But I have abandoned my intention on learning that Nasse's book is likely to be made generally accessible through an English translation. The undertaking is one which presents considerable difficulties. Nasse complains of the unusual scarcity of English records bearing on tenure and agricultural custom, but in this place we may note another class of difficulties having its source in those abundant technicalities of English real-property law which are so hard to read by any

body except the professional lawyer; and yet another in the historical theory of their land law which almost all English lawyers have adopted, and which colours all English treatises and all the decisions of English Courts—a theory which, it is not unjust to say, practically regards the manorial system as having no ascertainable antecedents, and all rights *primâ facie* inconsistent with it as having established themselves through prescription and by the sufferance of the lord. I may be allowed to say that the book in which Nasse has knotted together the two ends of the historical thread is a very extraordinary one to be written by a foreigner. Much of it deals with matter which can only be discussed appropriately in other departments of study; but I may notice in this place one set of causes, of a purely juridical nature, which, besides those assigned by Nasse, tended in later times to throw small or yeomen properties into the hands of large landowners. The popular opinion much exaggerates the extent to which this accumulation of landed properties had proceeded before the great inclosures of the last century, but still it had gone some length, and undoubtedly one cause was the influence, not at first strongly felt, of the Statute of Devises. Each landed proprietor ultimately acquired the power—within limits certainly, but very wide ones—to create a private law for his own estate. The efforts of English judges to introduce order into

this chaos made it rather worse; for the expedient which they adopted for the purpose was to give a forced technical meaning to the popular language of testators. One large and complex branch of English law is still concerned with the rules for construing in a technical sense the loose popular expressions found in wills. Every estate, willed away by a testator technically unlearned, was in danger of being burdened with a mass of conflicting rights and interests, for the most part never contemplated by the testator himself. There was only one way of insuring oneself against this consequence, and that was the employment of an expert to make the will; but there is reason to believe that the wholesale employment of legal experts which is now one of the singularities of this country is of comparatively modern date, since it is one of the traditions of the English Bar, derived from the last generation of lawyers, that among the great sources of litigation were at one time wills made by village schoolmasters. Estates thus burdened could only be held by very rich men; as they alone could provide and insure against the technical traps which abounded in the private law under which the land was held, or could render them innocuous by continued possession ending in a prescriptive title. It is impossible not to see that the practice of unshackled devise tended to bring small estates into the market as unprofitable to the holders through the

complication of interests in them, and at the same time tended to make them purchaseable by rich men only.

The simple truth is that, if a system of small or peasant holdings is to continue, the power of testators must be severely restrained in order to produce simplicity in the law of the estate. It does not at all follow that the restrictions must be those of the Code Napoleon; but restrictions there must be, and I venture to think that a not unsatisfactory solution of the problem is to be found in the law by which the Indian Government has recently sought to control the power of will-making, which the early English judges either introduced into India or invested with proportions which had never belonged to it before.

LECTURE VI.

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THE EARLY HISTORY OF PRICE AND RENT.

THE VILLAGE-COMMUNITIES which are still found in the Eastern world, exhibit, at first sight, a much simpler structure than appears on close examination. At the outset they seem to be associations of kinsmen, united by the assumption (doubtless, very vaguely conceived) of a common lineage. Sometimes the community is unconnected with any exterior body, save by the shadowy bond of caste. Sometimes it acknowledges itself to belong to a larger group or clan. But in all cases the community is so organised as to be complete in itself. The end for which it exists is the tillage of the soil, and it contains within itself the means of following its occupation without help from outside. The brotherhood, besides the cultivating families who form the major part of the group, comprises families hereditarily engaged in the humble arts which furnish the little society with articles of use and comfort. It includes a village watch and a village police, and there are organised authorities for

the settlement of disputes and the maintenance of civil order.

But, when the Indian village-communities are more carefully scrutinised, a more complex structure discloses itself. I told you that some dominant family occasionally claims a superiority over the whole brotherhood, and even over a number of separate villages, especially when the villagers form part of a larger aggregate, tribe or clan. But, besides this, the community itself is found, on close observation, to exhibit divisions which run through its internal framework. Sometimes men of widely different castes, or Mahometans and Hindoos, are found united in the same village group; but in such cases its artificial structure is not disguised, and the sections of the community dwell in different parts of the inhabited area. But the most interesting division of the community —though the one which creates most practical difficulty—may be described as a division into several parallel social strata. There are, first, a certain number of families who are traditionally said to be descended from the founder of the village; and I may here repeat a statement made to me that the agricultural traditions of India, differing in this from the heroic traditions which furnish a subject to the great Sanscrit poems, imply that the occupation of the rich Indian plains was a process rather of colonisation than of conquest. Below these families, descended from

the originators of the colony, there are others, distributed into well ascertained groups. The brotherhood, in fact, forms a sort of hierarchy, the degrees of which are determined by the order in which the various sets of families were amalgamated with the community. The tradition is clear enough as to the succession of the groups and is probably the representation of a fact. But the length of the intervals of time between each successive amalgamation, which is also sometimes given and which is always enormous, may be safely regarded as untrustworthy; and, indeed, numbers count for nothing in the East.

The relations of these component sections to one another have furnished Eastern statesmen with the problem which, of all others, has perplexed them most. For it has been necessary to translate them into proprietary relations. The superiority of each group in the hierarchy to those below it bears undoubtedly some analogy to superiority of ownership in the land which all alike cultivate. But the question has been, What is the superiority to carry with it when translated into a higher right of property? What division is it to imply of the total produce of the village domain? What power is it to confer of dealing with the land itself? A law of tenure and tenancy had in fact to be constructed, not only outside but inside the cultivating group.

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It is easy to see that these questions were not of the kind on which traditions were likely to throw any considerable light. For traditions, as I before stated, though tenaciously preserved by organised primitive societies, are only thoroughly to be depended upon when there have been acts and practices corresponding to them. It is extremely likely that the traditional respect of each group of families within the community for those above it did occasionally take some concrete form, but it is in the highest degree improbable that the various layers of the little society were connected by anything like the systematic payment of rent. For what is it which in primitive states of society forces groups of men to submit to that amalgamation of strangers with the brotherhood which seems at first forbidden by its very constitution ? It is the urgency of the struggle for existence—a struggle in the West probably both with man and with nature—in the East a struggle less with savage enemies than with nature, not indeed unkindly, but extraordinarily capricious, and difficult to subdue from her very exuberance. The utmost available supply of human labour at first merely extracts from the soil what is sufficient for the subsistence of the cultivating group, and thus it is the extreme value of new labour which condones the foreign origin of the new hands which bring it No doubt there comes a time when this process ceases, when the fictions which conceal it seem

to die out, and when the village-community becomes a close corporation. As soon as this point is reached there is no doubt that any new-comers would only be admitted on terms of paying money or rendering service for the use and occupation of land. But in India, at all events, another set of influences then came into play which have had the effect of making the vestiges of the payment of rent extremely faint and feeble. All Oriental sovereigns feed their courts and armies by an unusually large share of the produce of the soil which their subjects till. The Indian monarchs of whose practices we have any real knowledge took so much of the produce in the shape of land-revenue as to leave to the cultivating groups little more than the means of bare subsistence. There is no discernible difference in this respect between the Mahometan Emperors of Delhi, the Mahratta princes who were dividing the Mogul Empire between them when the English first appeared, or the still more modern Hindoo sectaries, called the Sikhs, from whom we conquered the Punjab. Such nobility as existed was supported not by rents but by assignments of the royal revenue; and the natural aristocracy of the country would have differed in little from the humbler classes but for these assignments, or for the money which stuck to their fingers as the tax-gatherers of the king. The fund out of which rent is provided is in fact a British creation—the fruit of the peace

which the British have kept and of the moderation of their fiscal demands.

It is sometimes said, in connection with this subject, that the idea of property in land is realised with extreme distinctness by the natives of India. The assertion is true, but has not the importance which it at first appears to possess. Between village-community and village-community, between total group and total group, the notion of an exclusive right to the domain is doubtless always present; and there are many striking stories current respecting the tenacity with which expelled communities preserve traditions of their ancient seat. But to convince himself that, as regards the interior of the group, the notion of dependent tenures connecting one stratum with another is very imperfectly conceived, it is only necessary for an impartial person to read or listen to the contradictory statements made by keen observers of equal good faith. The problem of Indian Rent cannot be doubted to be one of great intrinsic difficulty. To see this, it need only be stated. The question is not one as to a custom, in the true sense of the word; the fund out of which rent comes has not hitherto existed or has barely existed, and hence it has not been asserted on either side of the dispute that rent (as distinct from the Government revenue) was paid for the use or occupation of land before the establishment of the British Empire, or that, if it was

paid, it bore any relation to the competition value of cultivable soil. Nor was it an enquiry as to a tradition, because the further you recede from the beginning of British rule the greater is your distance from the conditions under which the exaction of competition-rent for land becomes conceivable. The true problem can only be stated by making an assumption contrary to the fact. Assume a market for land and assume the existence of the fund out of which rent comes—what primitive ideas can be traced which point to the distribution of the fund in any particular way? Such is the question. It is on the whole, I think, to be regretted that the British Government allowed its servants to embark on such an enquiry. However desirable it may be to govern the natives of the country in harmony with their own ideas, the effect of attempting to grapple with a problem under such vague conditions has led to violent recoils of opinion and practice on a matter in which settled policy was pre-eminently counselled by justice and prudence; and in this case it would have been better, I think, to abandon the historical mode of dealing with a practical question peculiar to the Indian government, to choose the social and economical principles on which it was intended to act, and to adhere to them until their political unsoundness was established. But to the student of legal history the question is one of very considerable interest, and, how

ever little suited it may be for the Council chamber, it may very excusably be handled in this place.

When first, amid the general discredit of the experiment tried by Lord Cornwallis in Bengal Proper, the Indian administrators of fifty or sixty years since began to recognise the village-community as the true proprietary unit of the country, they had very soon to face the problem of rent. They in some cases recognised an ownership superior to that of the village itself; though it is alleged by their critics that they did not recognise it as much as they ought to have done. Within the village-community they in all cases recognised a hierarchy of minor groups, distinguished in some way by the difference of their rights in the soil. Besides their observation of Indian phenomena, which was here (as I have explained) conducted under extraordinary difficulties, they had nothing to guide them to a conclusion except the English forms of property in land; and they probably accepted unreservedly from the lawyers of that day the belief that the system actually obtaining in England was not only the ancient system of the country but that it was semi-sacred. A further misleading influence was the phraseology already introduced by the Economists. Between customary rents and competition-rents they did not fail to distinguish, and would probably not have denied that, as a matter of fact, customary rents were more common and, as a matter

of recorded history, were more ancient than competition-rents. But still, misled by an error which has of late been very justly compared with a still more famous delusion of the Roman lawyers (by Mr. Cliffe Leslie, 'Fortnightly Review,' November 1870), they believed competition-rents to be, in some sense or other, more natural than customary rents, and to competition-rents only they gave the name Rent, unqualified by an epithet. This peculiar and (as it seems to me) improper selection of a cardinal term is not probably of much importance in this country; but few sufficiently instructed persons, who have followed recent Indian controversies, can have failed to observe that almost all the obscurities of mental apprehension which are implied in the use of Nature as a juridical term cluster in India round the word, Rent. Still there was too much around the earliest Anglo-Indian observers which seemed inconsistent with (to say the least) the universal occurrence in India of the English relation between landlord and tenant-at-will for them to assume unhesitatingly that the absolute ownership of the soil was vested in some one class, and that the rest of the cultivating community were simply connected with the proprietary class by paying for the use of the land whatever the members of that class saw fit to demand. They did assume that the persons who were acknowledged to be entitled to have the highest rights in the soil, whether within the community or without

it, bore a very close analogy to English landowners in fee simple. They further took for granted that the great mass of the cultivators were tenants-at-will of the English pattern. But they gave effect to their doubts of the correctness of these analogies by creating between landowner and tenant-at-will an intermediate class of protected, or, as they are called in the East, 'occupancy' tenants. When, under the government dispossessed by the British, any cultivator was shown to have held his land by himself or his ancestors for a certain space of time, he was declared to be entitled to a qualified protection against eviction and rack-rent. By a recent legislative enactment this principle has been generalised, and any cultivator who even under the British Government has been undisturbed by his landlord for the like period is invested, in some parts of India, with the same protection. But at first the rule, of which the origin is uncertain, was probably intended as a rough way of determining a class which in some sense or other was included within the village-community. The exact period of occupation selected was twelve years; the longest time during which it seems to have been thought safe to carry back into native society an enquiry upon legal evidence into a question of fact.

On this rule the most vehement of controversies has arisen. It is strongly asserted by a school of observation and theory which has many adherents in the

present day that close examination of village-communities does not show that mere lapse of time conferred any rights on one section of the group as against another. In Indian disputes, as in many others, the advantage is at first with destructive criticism, and, upon the evidence which I have seen, I am on the whole disposed to think that the school of which I am speaking is in the right. The errors into which it has fallen appear to me to begin at a subsequent point. Some of its adherents seem to think that a certain correspondence being assumed to exist between a certain Indian class and owners of land in England, and a certain correspondence being further assumed between another Indian class and English tenants, the inference inevitably follows that the correspondence must be so close as to imply all the incidents of the English relation of landlord and tenant-at-will. But the Indian forms of property in land are founded on the Village Group as the proprietary unit; the English forms are based partly on the Manorial Group and partly on a state of things produced by its disintegration—systems historically so wide apart can hardly be used even to illustrate one another. There are other adherents of the same opinion who, conscious perhaps of the true difficulty, attempt to get over it by asking the peasants belonging to the village-community what their customs are as to eviction, rack-rent, and the relation of landlord

and tenant. Now, if there were the faintest reason for supposing that there ever existed in India an open market for land and a system of competition-rents, such an enquiry would be of great importance, for unquestionably cultivating village groups are highly retentive of tradition. But, eviction being admitted to have been rarely (if ever) practised, and it being allowed that rent was never paid for the use of land or (if paid) was not paid on any scale which indicated its principle, to ask a peasant whether a given class of tenants ought or ought not to be subject to rack-rent and eviction is to put to a very ignorant man a question at once extremely complex, extremely ambiguous, and only capable of being answered (so far as it can be answered at all) after a careful examination of the parallel phenomena of many different ancient systems of law. The reference to the peasantry is doubtless honestly made, but it is an appeal to the least competent of tribunals.

The question, What vestiges remain of ancient ideas as to the circumstances under which the highest obtainable rent should be demanded for the use of land, is of some interest to the student of legal antiquities; although even in this place it is not a question which can be very confidently answered. The most distinct ancient rule which I have discovered occurs in the first of the official volumes containing the version of the Ancient Laws of Ireland published by the Irish

Government. 'The three rents,' it says, 'are rack-rent, from a person of a strange tribe—a fair rent, from one of the tribe—and the stipulated rent, which is paid equally by the tribe and the strange tribe.' (Senchus Mor, p. 159.)

This very much expresses the conclusion on the subject which I have arrived at upon the less direct evidence derived from a variety of quarters. The Irish clan was apparently a group much more extensive and of much looser structure than the Eastern or Western village-community; it appears even to have embraced persons who cannot be distinguished from slaves. Yet from none of these (apart from express agreement) could any rent be required but a rent fair according to received ideas, or, in other words, a customary rent. It was only when a person totally unconnected with the clan by any of those fictions explaining its miscellaneous composition which were doubtless adopted by this (as by all other) primitive groups—when such a person came asking for leave to occupy land, that the best bargain could be made with him to which he could be got to submit. 'Rack-rent' is sometimes used as a dyslogistic expression for an extreme competition-rent; but you will see that ideas associated with competition-rents in the economical sense have no relation whatever to such a transaction. In a primitive society the person who submits to extreme terms from one group is

pretty sure to be an outcast thrown on the world by the breaking up and dispersion of some other group, and the effect of giving him land on these terms is not to bring him under the description of a tenant as understood by the Economists, but to reduce him to a condition resembling predial servitude. I need hardly add that, in stating what seem to me the circumstances under which a rack-rent could be demanded according to primitive ideas, I am merely drawing an antiquarian inference, and expressing no opinion whatever on the political expediency or otherwise of limiting the claim of a landlord to rent.

The enquiry into these primitive ideas may also be conducted by another route, which I will follow for a brief space on account of some curious collateral questions which it opens. Let me begin by saying that the remains of ancient Roman law forcibly suggest that in ancient times transfers of the possession of land were extremely rare. The formalities which accompanied them were of extraordinary cumbrousness, and these formalities had to be strictly observed not only in transactions which we should call Conveyances, but also in the transactions which at a later date were styled Contracts. The ancient law further gives reason to think that the letting and hiring of movable property for a consideration was unknown or uncommon. The oldest Roman contracts systematically treated of are the Real Contracts, and

of the two contracts called Emptio Venditio, or Sale for Price, and Locatio Conductio, or Hiring for Consideration, that they are substantially the same, and that the rules which govern one may be applied to the other. The observation seems to me not only true, but one which it is important to keep in mind. You cannot indeed without forcing language speak of the Contract of Sale in terms of the Contract of Letting and Hiring; but the converse is easy, and there is no incorrectness in speaking of the Letting and Hiring of Land as a Sale for a period of time, with the price spread over that period. I must confess I could wish that in some famous books this simple truth had been kept in view. It has several times occurred to me, in reading treatises on Political Economy, that if the writer had always recollected that a competition-rent is after all nothing but price payable by instalments, much unnecessarily mysterious language might have been spared and some (to say the least) doubtful theories as to the origin of rent might have been avoided. The value of this impression anybody can verify for himself.

What, in a primitive society, is the measure of Price? It can only be called Custom. Although in the East influences destructive of the primitive notion are actively at work, yet in the more retired villages the artificer who plies an ancient trade still sells his wares for the customary prices, and would always

may ask—or, if you choose so to put it, that he does ask—the highest available price for the wares which he has to sell? I think that it is in the beginning a Rule of the Market, and that it has come to prevail in proportion to the spread of ideas originating in the Market. This indeed would be a proposition of little value, if I did not go farther. You are well aware that the fundamental proposition of Political Economy is often put as the rule of buying in the cheapest market and selling in the dearest. But since the primitive period the character of markets has changed almost as much as that of society itself. In order to understand what a market originally was, you must try to picture to yourselves a territory occupied by village-communities, self-acting and as yet autonomous, each cultivating its arable land in the middle of its waste, and each, I fear I must add, at perpetual war with its neighbour. But at several points, points probably where the domains of two or three villages converged, there appear to have been spaces of what we should now call neutral ground. These were the Markets. They were probably the only places at which the members of the different primitive groups met for any purpose except warfare, and the persons who came to them were doubtless at first persons specially empowered to exchange the produce and manufactures of one little village-community for those of another. Sir John Lubbock in his recent

in part to adjust the relations of Roman citizens to a subject population, grew also in part out of commercial exigencies, and the Roman Jus Gentium was gradually sublimated into a moral theory which, among theories not laying claim to religious sanction, had no rival in the world till the ethical doctrines of Bentham made their appearance. If, however, I could venture to detain you with a discussion on technical law, I could easily prove that Market Law has long exercised and still exercises a dissolving and transforming influence over the very class of rules which are profoundly modifying the more rigid and archaic branches of jurisprudence. The Law of Personal or Moveable Property tends to absorb the Law of Land or of Immoveable Property, but the Law of Moveable Property tends steadily to assimilate itself to the Law of the Market. The wish to establish as law that which is commercially expedient is plainly visible in the recent decisions of English courts of justice; a whole group of legal maxims having their origin in the law of the market (of which the rule of *caveat emptor* is the most significant) are growing at the expense of all others which compete with them; and there is a steady tendency in English legislation to engraft new rules, as from time to time they are developed by traders, upon the commercial law of England. Finally, the most recent of Indian disputes is whether native opinion admits of including in the Civil Code of the country the rule that a man who in good faith

has purchased goods of another shall have them, though the seller had really no title to them and though the owner claim them. This is in reality an extreme rule of Market Law, and it is often described in fact as the rule of Market Overt, since it only obtains in England where that description of market exists.

Political Economists often complain of the vague moral sentiments which obstruct the complete reception of their principles. It seems to me that the half-conscious repulsions which men feel to doctrines which they do not deny might often be examined with more profit than is usually supposed. They will sometimes be found to be the reflection of an older order of ideas. Much of moral opinion is no doubt in advance of law, for it is the fruit of religious or philosophical theories having a different origin from law and not yet incorporated with it. But a good deal of it seems to me to preserve rules of conduct which, though expelled from law, linger in sentiment or practice. The repeal of the Usury Laws has made it lawful to take any rate of interest for money, yet the taking of usurious interest is not thought to be respectable, and our Courts of Equity have evidently great difficulty in bringing themselves to a complete recognition of the new principle. Bearing this example in mind, you may not think it an idle question if I ask, What is the real origin of the feeling that it is not creditable to drive a hard bargain with a near

re or a friend ? It can hardly be said that there rule of morality to forbid it. The feeling seems to bear the traces of the old notion that men l in natural groups do not deal with one another inciples of trade. The only natural group in men are now joined is the family ; and the only of union resembling that of the family is that men create for themselves by friendship. It is that there is the strongest repulsion among the s of India to that extreme rule of Market Law I described to you as proposed to be engrafted e Civil Code. The point is doubtful on the ice, but, considering the prevalence and vitality anised natural groups in India, the *à priori* mption is certainly in favour of the existence alleged repugnance.

ll indications seem to me therefore to point to the conclusion. Men united in those groups out of modern society has grown do not trade together at I may call for shortness commercial prin-. The general proposition which is the basis of cal Economy, made its first approach to truth the only circumstances which admitted of men ng at arm's length, not as members of the same , but as strangers. Gradually the assumption of ght to get the best price has penetrated into the r of these groups, but it is never completely ed so long as the bond of connection between

man and man is assumed to be that of family or clan connection. The rule only triumphs when the primitive community is in ruins. What are the causes which have generalised a Rule of the Market until it has been supposed to express an original and fundamental tendency of human nature, it is impossible to state fully, so multifarious have they been. Everything which has helped to convert society into a collection of individuals from being an assemblage of families, has helped to add to the truth of the assertion made of human nature by the Political Economists. One cause may be assigned, after observation of the East, in the substitution of caravan or carrying trade for the frequentation of markets. When the first system grows up, the merchant, often to some extent invested with the privileges of an ambassador, carries his goods from the place of production, stores them in local entrepôts, and sells them on the principles of the Market. You will here call to mind the curious fact, stated to me on high authority, that the Grain-Dealer, though a man of great consequence and wealth, is often excluded in India from village or municipal privileges to which the small tradesmen whose business is an ancient appendage of the community are freely admitted. I am also informed that the natives of India will often pay willingly a competition price for one article, when they would think it unjust to be asked more than a customary price for another. A

man who will pay the price of the day for corn collected from all parts of India, or for cotton-cloth from England, will complain (so I am told) if he is asked an unaccustomed price for a shoe.

If the notion of getting the best price for moveable property has only crept to reception by insensible steps, it is all but certain that the idea of taking the highest obtainable rent for land is relatively of very modern origin. The rent of land corresponds to the price of goods, but doubtless was infinitely slower in conforming to economical law, since the impression of a brotherhood in the ownership of land still survived when goods had long since become the subject of individual property. So strong is the presumption against the existence of competition-rents in a country peopled by village-communities that it would require the very clearest evidence to convince me that they were anywhere found under native conditions of society, but the evidence (as I told you) is remarkably unconvincing. I of course admit that certain classes of people are so slightly connected with the village-community that, under the new conditions introduced into India by the English, their rents would probably have become competition-rents. The problem, however, presented by these classes is not antiquarian but political. It is identical with that terrible problem of pauperism which began to press on English statesmen as soon

as the old English cultivating groups began distinctly to fall to pieces. In India the solution will be far more difficult than it has proved here, since the country has little mineral fuel and can have no manufactures on a scale to occupy a large surplus population; and emigration for the most part is regarded as mortal sin.

The right to take the highest obtainable rent for land is, as a matter of fact and as a matter of morality, a right derived from a rule of the market. Both the explanation and the justification of the exercise of the right in England and Scotland is that in these countries there really is a market for land. Yet it is notorious that, in England at all events, land is not universally rackrented. But where is it that the theoretical right is not exercised? It is substantially true that, where the manorial groups substituted for the old village groups survive, there are no rackrents. What is sometimes called the feudal feeling has much in common with the old feeling of brotherhood which forbade hard bargains, though like much else it has passed from the collective community to the modern representative of its autocratic chieftain. Even in England the archaic rules I have been describing have not yet quite lost their authority.

Here I conclude the Lectures of the Term. Their chief object, as I have repeatedly stated, has been to

lish a connection between the results of Indian ience and observation and the conclusions ed at by German and English learning. But er purpose will have been served if some of who have attended here are induced to help in g to our knowledge of ancient English tenures. ite of the information collected by the Select nittee of 1844, we know far too little of Com- and Commonable fields, of Lammas lands, non meadows, and limited rights over Wastes, generally of manorial customs. Yet forms of rty, savouring of the old collective enjoy- , seem to occur so frequently that almost any- has the opportunity of collecting facts which have an important bearing on our enquiry. speculative interest of the subject I need scarcely ge upon, but these ancient joint-holdings have ther interest as constituting not only some of ldest, but some of the most lasting phenomena nglish history. It is a striking remark of Nasse the English common field system bears the marks exotic origin. In the time of the ruder agri- re which has now given way to scientific tillage, atural fitness of the soil of England was for grass ng, and the tendency to resort to it as the most table form of cultivation was apparently irresist- and out of it grew some very serious agrarian ments. The three-field system was therefore ght by our Teutonic ancestors from some drier

region of the Continent. It is a very remarkable fact that the earliest English emigrants to North America—who, you know, belonged principally to the class of yeomanry—organised themselves at first in village-communities for purposes of cultivation. When a town was organised, the process was that 'the General Court granted a tract of land to a company of persons. The land was first held by the company as property in common.' (Palfrey, 'History of New England,' ii. 13.) An American commentator on this passage adds: 'The company of proprietors proceeded to divide the land by assigning first house-lots (in Marlborough from fifteen to twenty acres), then tracts of meadow land, and in some cases mineral land, i.e. where bog-iron ore was found. Pasture and woodland remained in common as the property of the company, but a law of the General Court in 1660 provided that "hereafter no cottage or dwelling-house be admitted to the privilege of commonage for wood, timber, or herbage but such as are already in being, or shall be erected with the consent of the town." From that time the commoners appear as a kind of aristocracy, and the commons were gradually divided up.' This is not only a tolerably exact account of the ancient European and existing Indian village-community, but it is also a history of its natural development, where the causes which turn it into a manorial group are absent, and of its ultimate dissolution.

THE EFFECTS OF OBSERVATION OF INDIA

ON MODERN EUROPEAN THOUGHT.

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known to him through the translation of *Sakuntala*, seems to have scarcely abated in the scholars of our day who follow philological studies and devote themselves to the new branches of investigation constantly thrown out by the sciences of Comparative Philology and Comparative Mythology. Nor can one avoid seeing that their view of India affects in some degree their view of England; and that the community, which is stigmatised more systematically on the Continent than it is perhaps aware, as a nation of shopkeepers, is thought to have had a halo of romance spread around it by its great possession. Why India is on the whole so differently regarded among ourselves, it is not, I think, hard to understand. It is at once too far and too near. Morally and politically, it is very far from us indeed. There are doubtless writers and politicians who think they have mastered it with little trouble, and make it the subject of easy and shallow generalisations; but the thinker or scholar who approaches it in a serious spirit finds it pregnant with difficult questions, not to be disentangled without prodigious pains, not to be solved indeed unless the observer goes through a process at all times most distasteful to an Englishman, and (I will not say) reverses his accustomed political maxims, but revises them, and admits that they may be qualified under the influence of circumstance and time. On the other hand, India is in a sense near to us; all

that is superficial and commonplace in it is pretty well known. It has none of the interest of a country barely unveiled to geographers, of the valley of the Oxus or the basin of Lake Tanganyika. It is mixed up with the ordinary transactions of life, with the business of government, with debates in Parliament not too well attended, with the stock exchange, the cotton market, and the annual relief of regiments. Nor do I doubt that the cause of the evil reputation of India which extends most widely is the constant and frequent complaints, which almost everybody receives from relatives settled there, of the monotony of life which it entails upon Europeans. It is perhaps worth while observing that this feeling is a permanent and not unimportant phenomenon, and that other immigrants into India from colder countries, besides modern Englishmen, have spoken of the ennui caused to them by its ungenial climate and the featureless distances of its plains. The famous founder of the Mogul dynasty, the Emperor Baber, confesses it as frankly as a British subaltern might do, and speaks of India in words which, I fear, have been too frequently echoed mentally or on paper. 'Hindostan,' he states, after closing the history of his conquest, 'Hindostan is a country that has few pleasures to recommend it. The country and towns are extremely ugly. The people are not handsome. . . The chief excellency of Hindostan is that it is a very large

country, and that it has abundance of gold and silver.'

The fact that knowledge of India has deeply affected European thought in many ways already, needs (I presume) no demonstration. There are many here who could explain with more authority and fulness than I could, the degree in which the discovery of Sanscrit has influenced the whole science of language, and therefore the classical studies still holding their own in the University. It is probable that all moderately intelligent young men who pursued those studies in the not very remote time before Englishmen were familiarly acquainted with the structure raised by German scholars on the foundations laid by our countrymen Jones and Colebrooke, had some theory or other by which they attempted to connect the linguistic phenomena always before them; but on such theories they can only now look back with amazement. To those again who can remember the original publication of Mr. Grote's History, and can recall the impression made upon them by his discussion of the real relation which Greek fable bore to Greek thought, it is most interesting to reflect that almost at the same moment another fruit of the discovery of Sanscrit was attaining to maturity, and the remarkable science of Comparative Mythology was taking form. There are other results, not indeed of knowledge of Indian lan-

will find them extremely unlike those which are now advocated, and even passionately advocated, in parts of the Continent. For the most part the older bases theoretically suggested were common history, common prolonged subjection to the same sovereign, common civilisation, common institutions, common religion, sometimes a common language, but then a common vernacular language. That peoples not necessarily understanding one another's tongue should be grouped together politically on the ground of linguistic affinities assumed to prove community of descent, is quite a new idea. Nevertheless, we owe to it, at all events in part, the vast development of German nationality; and we certainly owe to it the pretensions of the Russian Empire to at least a presidency over all Sclavonic communities. The theory is perhaps stretched to the point at which it is nearest breaking when men, and particularly Frenchmen, speak of the Latin race.

India has given to the world Comparative Philology and Comparative Mythology; it may yet give us a new science not less valuable than the sciences of language and of folk-lore. I hesitate to call it Comparative Jurisprudence because, if it ever exists, its area will be so much wider than the field of law. For India not only contains (or to speak more accurately, did contain) an Aryan language older than any other descendant of the common mother-tongue,

and a variety of names of natural objects less perfectly crystallised than elsewhere into fabulous personages, but it includes a whole world of Aryan institutions, Aryan customs, Aryan laws, Aryan ideas, Aryan beliefs, in a far earlier stage of growth and development than any which survive beyond its borders. There are undoubtedly in it the materials for a new science, possibly including many branches. To create it indeed, to give it more than a beginning, will require many volumes to be written and many workers to lend their aid. It is because I am not without hope that some of these workers will be found here that I now proceed to show, not, indeed, that the attempt to produce such a science will succeed, but that the undertaking is conceivable and practicable.

But first let me try to give some sort of answer to the question which probably has occurred to many minds—why is it that all things Aryan, the chief part of the heritage of the greatest of races, are older in India than elsewhere? The chief secret, a very simple one, lies probably in the extreme isolation of the country until it was opened by maritime adventure. Approached not by sea but by land, there is no portion of the earth into which it is harder to penetrate. Shut in by the Himalayas and their offshoots, it lies like a world apart. The great roads between Western and Eastern Asia probably lay

always to the north, as they did in the time of Marco Polo, connecting what once was and what still is the seat of a great industrial community—Asia Minor and China. The India of Herodotus is obviously on the hither side or in the close vicinity of the Indus; the sand of the great Indian desert which lies on the other bank was believed to extend to the end of the world. Megasthenes (*Strabo*, xv. 1. 6) cautioned his readers against believing stories concerning the ancient history of the Indians, because they had never been conquered. The truth is that all immigrations into India after the original Aryan immigration, and all conquest before the English conquest, including not only that of Alexander, but those of the Mussulmans, affected the people far more superficially than is assumed in current opinions. The true knowledge of India began with the era of distant navigation, and even down to our fathers' day it was extraordinarily slight. Even when maritime adventure did reveal something of the country, it was only the coast populations which were in any degree known. It is worth while pausing to remark that these coast populations have very materially contributed, and still contribute, to form the ordinary European view of India. The French philosophical writers of the last century, whose opinions at one time exercised directly, and still exercise indirectly, considerable influence over the fortunes of mankind, were accustomed to theorise largely about

against overbold generalisation; for it unfortunately happens that the ordinary food of the people of India is not rice. It is a product of the coast, growing in the deltas of great rivers, and only at one point of the country extending any distance inland. And there is another product of the coast of India which furnishes some of the best intentioned of our countrymen with materials for a rather hasty generalisation as to India as a whole. For it is in the cities of the coast and their neighbourhood that there has sprung up, under English influence, a thirst for knowledge, a body of opinions, and a standard of taste, which are wholly new in India. There you may see universities thronged like the European schools of the later middle age. There you may observe an eagerness in the study of Western literature and science not very unlike the enthusiasm of European scholars at the revival of letters. From this part of India come those most interesting samples of the native race who from time to time visit this country; but they are a growth of the coast, and there could be no greater mistake than to generalise from them as to the millions upon millions of men who fill the vast interior mass of India.

If passing beyond the fringe of British civilisation which is found at certain points of the Indian coasts, you enter this great interior block, you find that the ideas which it suggests are very different

indeed from those current about India even in this country. Such ideas have little in common with the apparent belief of some educated persons here that Indians require nothing but School Boards and Normal Schools to turn them into Englishmen, and very much less in common with the brutal assumption of the English vulgar that there is little to choose between the Indian and the negro. No doubt the social state there to be observed can only be called Barbarism, if we could only get rid of unfavourable associations with the word; but it is the barbarism either of the very family of mankind to which we belong, or of races which have accepted its chief and most characteristic institutions. It is a barbarism which contains a great part of our own civilisation, with its elements as yet inseparate and not yet unfolded. All this interior India has been most carefully observed and described by English functionaries from the administrative point of view, and their descriptions of it are included in hundreds of reports, but a more accessible and popular account of the state of idea, belief, and practice at the very centre of this great group of countries may be read in a series of most instructive papers lately published by Mr. Lyall, a gentleman now high in Indian office. (See NOTE A.) The province he describes, Berar, is specially well situated for such observations, for, though relieved from internal disturbance, it has been

as yet very imperfectly brought under British influences, being only held by the British Government in deposit from the great Mahometan prince of the South, the Nizam. There is no doubt that this is the real India, its barbarism (if I must use the word) imperceptibly giving way in the British territories until it ends at the coast in a dissolution amid which something like a likeness of our own civilisation may be discerned.

I spoke of the comparative preservation of primitive custom and idea in India as explicable in part through the geographical position of the country. But no reader of Mr. Lyall's papers can doubt that another powerful preservative has been the influence of Religion and Caste, an influence, however, of which I must warn my hearers that they will gain no accurate conception from the impressions generally given by the words I have used. European scholars, having hitherto been chiefly interested in the ancient languages of India and in the surprising inferences suggested by them, have very naturally acquiesced in the statements which the sole literary class has made about itself and its creed. But nothing can give a falser impression of the actual Brahminical religion than the sacred Brahminical literature. It represents itself as an organised religious system, whereas its great peculiarity, and (I may add) its chief interest, arises from its having no organisation

the Hellenic genius, clothes them exclusively with grotesque or terrible forms. What is more to my present purpose, every institution, every pursuit, every power beneficent or maleficent, is consecrated by a supernatural influence or presidency. Thus ancient practices and customs, little protected by law, have always been protected by religion; nor would it be difficult to obtain the same protection for new laws, if sternly enforced, and for new manifestations of irresistible authority. I am persuaded that, if the British Government of India were not the organ of a free and Christian community, nothing would have been easier for it than to obtain that deification and worship which have seemed to some so monstrous when they were given to the Roman Emperors. In that mental atmosphere it would probably have grown up spontaneously; and, as a matter of fact, some well-known Indian anecdotes narrate the severity which has had to be used in repressing minor and isolated instances of the same tendency. One brave soldier and skilful statesman is remembered in India not only for his death at the head of the storming party which had just made its way into Delhi, but for having found himself the centre of a new faith and the object of a new worship, and for having endeavoured to coerce his disciples into disbelief by hearty and systematic flogging.

The common religious sanction binding the various

have been preserved under the influence of caste in extraordinary completeness, along with the institutions and ideas which are their appendage. At the same time, Mr. Lyall explains that the process of forming castes still continues, especially sectarian castes. A new sect, increasing in numbers and power, becomes a new caste. Even this dissolution and recombination tends, however, on the whole to preserve the ancient social order. In Western Europe, if a natural group breaks up, its members can only form a new one by voluntary agreement. In Central India they would recombine on the footing and on the model of a natural family.

Assuming then that the primitive Aryan groups, the primitive Aryan institutions, the primitive Aryan ideas, have really been arrested in India at an early stage of development, let me ask whether any, and, if so, what sort of addition to our knowledge may be expected from subjecting these phenomena to a more scientific examination, that is, an examination guided by the method which has already led to considerable results in other fields of comparative enquiry. I will try to illustrate the answer which should be given by taking one great institution, Property. It is unnecessary, I suppose, to enlarge on its importance. The place which it occupies as a source of human motive has been proclaimed by all sorts of writers, in all kinds of languages, in every mood and vein—gravely,

observers had written upon institutions wholly unlike ours, their papers would have small interest for us. If Englishmen settled in India had found there kinds of property such as might be attributed to Utopia or Atlantis, if they had come upon actual community of goods, or an exact equality of all fortunes, or on an exclusive ownership of all things by the State, their descriptions would at most deserve a languid curiosity. But what they found was very like, and yet appreciably unlike, what they had left at home. The general aspect of this part of social mechanism was the same. There was property, great and small, in land and moveables; there were rent, profits, exchange, competition; all the familiar economical conceptions. Yet scarcely one of them exactly corresponded to its nearest Western counterpart. There was ownership, but joint ownership by bodies of men was the rule, several ownership by individuals was the exception. There was the rent of lands, but it had to be reconciled with the nearly universal prevalence of fixity of tenure and the consequent absence of any market standard. There was a rate of profit, but it was most curiously under the influence of custom. There was competition, but trade was conducted by large bodies of kinsmen who did not compete together; it was one large aggregate association which competed with another. The observations of these facts by Anglo-Indian functionaries

with the early history and gradual development of European ownership, ownership, that is to say, of land. But the Historical Method in their hands has not yet been quickened and corrected by the Comparative Method, nor are they fully as yet aware that a large part of ancient Europe survives in India. They are thus condemned for awhile to struggle with the difficulties which embarrassed the scholar who speculated on the filiation and mutual relation of languages at a time when the reality of a Sanscrit literature was obstinately discredited, or when Sanscrit was believed to be an artificial cryptic dialect invented by the Brahmins.

The first step towards the discovery of new truth on these subjects (and perhaps the most difficult of all, so obstinate are the prejudices which stand in the way) is to recognise the Indian phenomena of ownership, exchange, rent, and price as equally natural, equally respectable, equally interesting, equally worthy of scientific observation, with those of Western Europe. The next will have been accomplished when a set of enquiries now actively conducted in the eastern parts of the Continent of Europe have been carried farther, and when a set of economical facts strongly resembling those familiar to Englishmen in India have been collected from Aryan countries never deeply affected by the Roman Empire on the one hand, nor by Mahometanism on the other—for Ma-

ıll we are permitted to see—All men are brothers,
all men are equal. The scene before us is rather
; which the animal world presents to the mental
of those who have the courage to bring home to
nselves the facts answering to the memorable
ory of Natural Selection. Each fierce little com-
nity is perpetually at war with its neighbour, tribe
h tribe, village with village. The never-ceasing
icks of the strong on the weak end in the manner
ressed by the monotonous formula which so often
ırs in the pages of Thucydides, 'they put the
ı to the sword, the women and children they
l into slavery.' Yet, even amid all this cruelty
l carnage, we find the germs of ideas which have
ead over the world. There is still a place and a
se in which men are brothers and equals. The
versal belligerency is the belligerency of one total
up, tribe, or village, with another; but in the
erior of the groups the regimen is one not of
flict and confusion but rather of ultra-legality.
e men who composed the primitive communities
ieved themselves to be kinsmen in the most literal
se of the word; and, surprising as it may seem,
re are a multitude of indications that in one stage
thought they must have regarded themselves as
uals. When these primitive bodies first make their
earance as landowners, as claiming an exclusive
oyment in a definite area of land, not only do their

shares of the soil appear to have been originally equal, but a number of contrivances survive for preserving the equality, of which the most frequent is the periodical redistribution of the tribal domain. The facts collected suggest one conclusion which may be now considered as almost proved to demonstration. Property in Land, as we understand it, that is, several ownership, ownership by individuals or by groups not larger than families, is a more modern institution than joint property or co-ownership, that is, ownership in common by large groups of men originally kinsmen, and still, wherever they are found (and they are still found over a great part of the world), believing or assuming themselves to be in some sense of kin to one another. Gradually, and probably under the influence of a great variety of causes, the institution familiar to us, individual property in land, has arisen from the dissolution of the ancient co-ownership.

There are other conclusions from modern enquiry which ought to be stated less confidently, and several of them only in negative form. Thus, wherever we can observe the primitive groups still surviving to our day, we find that competition has very feeble play in their domestic transactions, competition (that is) in exchange and in the acquisition of property. This phenomenon, with several others, suggests that Competition, that prodigious social force of which the action is measured by political economy, is of

relatively modern origin. Just as the conceptions of human brotherhood and (in a less degree) of human equality appear to have passed beyond the limits of the primitive communities and to have spread themselves in a highly diluted form over the mass of mankind, so, on the other hand, competition in exchange seems to be the universal belligerency of the ancient world which has penetrated into the interior of the ancient groups of blood-relatives. It is the regulated private war of ancient society gradually broken up into indistinguishable atoms. So far as property in land is concerned, unrestricted competition in purchase and exchange has a far more limited field of action even at this moment than an Englishman or an American would suppose. The view of land as merchantable property, exchangeable like a horse or an ox, seems to be not only modern but even now distinctively Western. It is most unreservedly accepted in the United States, with little less reserve in England and France, but, as we proceed through Eastern Europe, it fades gradually away, until in Asia it is wholly lost.

I cannot do more than hint at other conclusions which are suggested by recent investigation. We may lay down, I think at least provisionally, that in the beginning of the history of ownership there was no such broad distinction as we now commonly draw between political and proprietary power, between the

but than ownership in common (which is only beginning to be suspected), some advantage may be gained by those assailants of the institution itself whose doctrines from time to time cause a panic in modern Continental society. I do not myself think so. It is not the business of the scientific historical enquirer to assert good or evil of any particular institution. He deals with its existence and development, not with its expediency. But one conclusion he may properly draw from the facts bearing on the subject before us. Nobody is at liberty to attack several property and to say at the same time that he values civilisation. The history of the two cannot be disentangled. Civilisation is nothing more than a name for the old order of the Aryan world, dissolved but perpetually re-constituting itself under a vast variety of solvent influences, of which infinitely the most powerful have been those which have, slowly, and in some parts of the world much less perfectly than others, substituted several property for collective ownership.

If such a science as I have endeavoured to shadow forth in this Lecture is ever created, if the Comparative Method applied to laws, institutions, customs, ideas, and social forces should ever give results resembling those given by Comparative Philology and Comparative Mythology, it is impossible that the consequences should be insignificant. No knowledge,

of the conventional obloquy attaching to his name, and strong as is the reluctance to accept the greatest happiness of the greatest number as the standard of morality, no observant man can doubt that it is fast taking its place in the modern world as the regulative principle of all legislation. Yet nobody can carefully examine the theory of human nature which it implies without seeing that it has great imperfections, and that unless some supplementary qualifying principles be discovered, a host of social experiments will bring with them a vast measure of disappointment. For these qualifications I look forward far less to discussions on moral philosophy as it is at present understood, than to some such application of the comparative method to custom, idea, and motive as I have tried to recommend. Another illustration of my meaning I will take from Political Economy. The science consists of deductions from the assumption that certain motives act on human nature without check or clog. There can be no question of the scientific propriety of its method, or of the greatness of some of its practical achievements; yet only its bigots assert that the motives of which it takes account are the only important human motives, or that whether they are good or bad, they are not seriously impeded in their operation by counteracting forces. All kinds of irrelevant charges, or charges weak to puerility, have been brought against political

economy ; but no doubt the best c
do occasionally lay themselves open
tion that they generalise to the who
part of it ; that they are apt to spe
positions as true *à priori*, or from al
they greatly underrate the value, pov
of that great body of custom and
which, according to the metaphor w
borrowed from the mechanicians, the
friction. The best corrective which
to this disposition would be a demon
'friction' is capable of scientific an
tific measurement ; and that it will
capable of it I myself firmly believe.

For some obvious reasons, I re
than a mere reference to one set of
servation of India might have on Eu
those which might be conceived as
spectacle of that most extraordinary
British government of India, the v
government of a dependency by a fre
I only venture to assert that observati
Indian political system might throw
light on some obscure or much misu
of history. I take an example in th
Romans under the Empire. It has b
much learning and acumen ; yet it i
little popular knowledge has advanc

published the 'Decline and Fall.' In our popular literature the old commonplaces hold their ground; the functionaries are described as everywhere oppressive and corrupt, the people as enervated, the taxation as excessive, the fortunes of the State are treated as wholly bound up with the crimes and follies of the Emperors. The incompleteness, in some respects the utter falsity of the picture, is well known to the learned, yet even they have perhaps hardly made enough of the most instructive parallels furnished by the British government of India. The remark has been made that the distinction between the provinces of the Senate and the provinces of the Prince seemed to be the British Indian distinction between a Regulation and a Non-Regulation province, but few know how curiously close is the analogy, and how the history of the competing systems has run precisely the same course. Few, again, have quite understood how the ordinary administration of a Native Indian State, or of a British Province under semi-military rule, throws light upon the condition of the Jewish Commonwealth during that era of supreme interest and importance when it was subject to the Romans, and yet not completely incorporated with the Empire. What may be called the secular portions of the Acts of the Apostles come strangely home to Indian functionaries. They know better than other men what sort of princes were Herod Antipas and Agrippa;

how natural to different forms of the official mind is the temper of Festus on the one hand and the temper of Gallio on the other; how steady is the effort of priestly classes to bring secular authority to their side; how very important and turbulent an interest is that of the makers of silver shrines for the goddess; and how certainly, if the advent of Christian missionaries were to cause a riot in an Indian city, the Deputy Commissioner would send for the leading citizens and, in very nearly the words of the town-clerk of Ephesus, would tell them that, if they had anything to complain of, there were Courts and the Penal Code. Turning to more general topics, let me say that a problem now much perplexing historical scholars is simplified by experience of India. How was it that some institutions of the Provinces were crushed down and levelled by the Roman Imperial system, while others, derived from the remotest Aryan antiquity, were kept in such preservation that they easily blended with the institutions of the wilder Aryan races who broke into the Empire? British India teaches us that part of the destroying process is inevitable; for instance, the mere establishment of a Court of Justice, such as a Roman Court was, in Gaul would alter and transform all the customary rights of the Gallic Celts by arming them with a sanction. On the other hand, certain institutions of a primitive people, their corporations and

village-communities, will always be preserved by a suzerain state governing them, on account of the facilities which they afford to civil and fiscal administration. Both the good and the evil of the Roman Empire are probably reproduced in British India. There are the almost infinite blessings of the Pax Britannica, and an enormous growth of wealth, comfort, and material happiness ; but there are some drawbacks, and among them no doubt is the tendency of a well-intentioned, and, on the whole, successful government, to regard these things as the sum of all which a community can desire, and to overlook the intangible moral forces which shake it below the surface.

From whatever point of view India is examined, if only it be carefully and conscientiously examined, one consequence must, I think, certainly follow. The difficulty of the experiment of governing it will be better understood, and possibly the undertaking will be regarded with more consideration. The general character of this difficulty may be shortly stated. There is a double current of influences playing upon this remarkable dominion. One of these currents has its origin in this country, beginning in the strong moral and political convictions of a free people. The other arises in India itself, engendered among a dense and dark vegetation of primitive opinion, of prejudice if you please, stub-

is once touched by it, it spreads like a contagion. Yet, so far as our knowledge extends, there was only one society in which it was endemic ; and putting that aside, no race or nationality, left entirely to itself, appears to have developed any very great intellectual result, except perhaps Poetry. Not one of those intellectual excellencies which we regard as characteristic of the great progressive races of the world—not the law of the Romans, not the philosophy and sagacity of the Germans, not the luminous order of the French, not the political aptitude of the English, not that insight into physical nature to which all races have contributed—would apparently have come into existence if those races had been left to themselves. To one small people, covering in its original seat no more than a handsbreadth of territory, it was given to create the principle of Progress, of movement onwards and not backwards or downwards, of destruction tending to construction. That people was the Greek. Except the blind forces of Nature, nothing moves in this world which is not Greek in its origin. A ferment spreading from that source has vitalised all the great progressive races of mankind, penetrating from one to another, and producing results accordant with its hidden and latent genius, and results of course often far greater than any exhibited in Greece itself. It is this principle of progress which we Englishmen are communicating

ADDRESS TO UNIVERSITY OF CALCUTTA.[1]

THOSE Members of the Senate who have been connected with our University since its foundation, will not be surprised if, in what I have to say to you, I depart in some degree from the addresses of former Vice-Chancellors. I have obtained from the Registrar copies of those addresses, so far as they have been reported, and I see that they are principally devoted to explaining to the Native Students, and through them to the Natives of India generally, what is the nature of a University, and to impressing on them the value of the distinctions it confers. It is not, I think, necessary to dwell any longer on those topics; indeed I am not sure that more harm than good would not be done by my dwelling on them. There is now more evidence than enough that our University has taken root. I have seen it stated that the increase in the numbers of the older English Universities is about six per cent.; but the increase of the University of Calcutta is no longer expressed by

[1] (Delivered before the Senate, March 1864.)

Universities of England. We should merely be imitating their external and temporary characteristics if we omitted to follow them in that one characteristic which has redeemed all their shortcomings—the thoroughness of their tests and the conscientiousness of their teaching. It would be vain to deny, and I am sure that I do not care to deny, that Oxford and Cambridge have in time past been guilty of many faults both of omission and of commission. They have failed to teach much which they ought to have taught, and taught much which they ought not to have taught; but whatever they did teach, they have taught with a stern and severe completeness. Their weak side has been intolerance of new subjects of thought; their strong side has been their intolerance of superficiality. It is this direction which all our future efforts, the efforts both of the University and of all the Colleges affiliated to it, ought to follow; and this direction has, I am happy to say, been in fact followed in those alterations of our course to which the Senate has recently given its sanction—alterations of which the principal credit belongs, as I am sure all associated with him will allow, to my immediate predecessor Mr. Erskine One great step forwards has been made in the substitution, of course the partial and gradual substitution, of classical languages for vernacular or spoken languages, as subjects of examination. I

the papers which contain the answers. My im-
ssion, which coincides, I believe, with that of the
aminers, is that, in those subjects in which high
ficiency may reasonably be expected, the evidence
industry, quickness and clearness of head, is not
y materially smaller than the proof of similar
lities furnished by a set of English examination
ers. Superficiality will to some extent form part
the results of every examination, but I cannot
scientiously say that I have seen much more of
here than in the papers of older Universities.
d now, as I am on this topic, I will observe that
re is one characteristic of these papers which has
uck me very forcibly. It is the extraordinary
bition of the Native Student to write the best—
haps I should rather say the finest—English. In
ne cases the attempt has been singularly successful;
others it has failed, and I think I may do some
d to the Native Students present if I say why I
sider it has failed. It has failed, then, because
attempt has been too consciously and deliberately
de. Of course I do not forget that these Students
writing in a foreign tongue, and that their per-
mances are justly compared only with those Latin
mes which some of the gentlemen around me have
itten in their youth. But on the other hand, the
glish of a Bengali lad is acquired for permanent

leaves me no doubt that the accomplishment of writing good English is something which lies very near to the heart of the Native Students.

I have now to address myself to matters which are of equal interest to all of us, to the events which have marked the history of the University during the year. The most conspicuous of these events is the calamity which deprived us of our Chancellor, as it did India of its Viceroy. I am very sensible that, in speaking to the Members of the University of Lord Elgin, I must use the same language which all who were associated with him are obliged to use of his government of India—that he died too soon for much visible proof to be given of the good intentions of which his heart was full. What I have to say of him with more particular relation to the University, I will postpone for a moment or two, and I pass to another incident of the year's history, of which I could almost be contented to say that no heavier blow has fallen on the University since its foundation —I mean the final departure from India of our colleague, Dr. Duff. It would be easy for me to enumerate the direct services which he rendered to us by aiding us, with unflagging assiduity, in the regulation, supervision, and amendment of our course of study; but, in the presence of so many Native Students and Native Gentlemen who viewed him with the deepest regard and admiration, although

science, because its conclusions were supposed to lead to irreligious consequences, Dr. Duff, believing his own creed to be true, believed also that it had the great characteristic of truth—that characteristic which nothing else except truth possesses—that it can be reconciled with everything else which is also true. If you only realize how rare this combination of qualities is—how seldom the energy which springs from religious conviction is found united with perfect fearlessness in encouraging the spread of knowledge, you will understand what we have lost through Dr. Duff's departure, and why I place it among the foremost events in the University year. The next incident I have to advert to, in relation to the University of Calcutta, is not a fact, but the contrary of a fact. Most of you have heard of the munificent donations which have been made to the University of Bombay by the Native community of that Presidency. I am sorry to have to state that there is nothing of the kind to record of Calcutta. I do not mean to say anything harsh when I declare that our position, in regard to the Natives of Bengal, is one of perpetually giving and never taking—of always conferring and never receiving. We have sextupled our students, but it is humiliating to have to state that the only assistance accruing to the higher education in Bengal from any quarter, except the Government, has consisted in the right to share

do, out of the taxes, paid to a great extent as taxes always must be, by the poorest of the poor. Yet I think that if ever there was a country in which we might expect the wealthier classes to have the ambition of perpetuating their names by University endowments, it is India. There seems to me to be no country in which men look so far forward or so far backward —in which men so deliberately sacrifice their lives to the consideration of what their ancestors have done before them, and of what their descendants will do after them. I may surprise some of you by saying this; but it is my fixed opinion, that there is no surer, no easier, and no cheaper road to immortality, such as can be obtained in this world, than that which lies through liberality expending itself in the foundation of educational endowments. I turn again to the older English Universities, which I mention so often because I know them best. If you could transport yourselves to Oxford or Cambridge, you would hear ringing in your ears the names of hundreds of men whose memories would have perished centuries ago if they had not linked them to the Universities by their benefactions. I will give you an example. After you pass out of the gate of my own College at Cambridge, you have before you one of the most famous, one of the most beautiful, one of the most useful of University foundations. It is called Caius College, and it is the chief school of

of India. Lord Elgin was, as you know, the descendant of the most famous King in the line of Scottish Kings, and yet I doubt whether he was prouder of this great ancestry, or prouder of any of his successes in government or policy, than of the honour which he obtained in his youth when he was elected a Fellow of Merton College at Oxford.

I have now a very few words more to say, and these shall be addressed to those for whom this Meeting is principally intended—the Native Students who have just taken their degrees. As I stated when I began, I do not think that the taste of the Native youth of Bengal for intellectual knowledge requires to be much stimulated; there are too many motives at work to encourage it; still there is one motive which I will dwell upon for a moment, because, if it were properly appreciated, it would at once be the strongest and the most legitimate inducement to exertion. Probably, if we could search into the hearts of the more refined portions of the Native community, we should find that their highest aspiration was to be placed on a footing of real and genuine equality with their European fellow-citizens. Some persons have told them that they are equal already, equal in fact as they undoubtedly are before the law. Most of you have heard of one remarkable effort which was made to establish this position. A gentle-

man, who was then a Member of the Government of India, Mr. Laing, went down to the Dalhousie Institute, and, in a Lecture delivered there, endeavoured to popularize those wonderful discoveries in philological science which have gone far to lift the hypothesis of the common parentage of the most famous branches of the human family to the level of a scientific demonstration. I do not know that anybody was ever more to be admired than Mr. Laing for that act of courage, for I know how obstinate were those prejudices which he sought to overthrow, and to what a height they had risen at the moment when he spoke. The effect produced by his lecture on the Aryan race must have been prodigious, for I am sure I scarcely see a single native book or newspaper which does not contain some allusion to Mr. Laing's argument. Yet although what Mr. Laing then taught is truth, nothing can be more certain than that it is barren truth. Depend upon it, very little is practically gained by the Native when it is proved, beyond contradiction, that he is of the same race with the Englishman. Depend upon it, the true equality of mankind lies, not in the past, but in the future. It may come—probably will come—but it has not come already. There are some, who, like our late colleague, Dr. Duff, believe that the time will arrive, when all men in India will be equal under the shadow of the same religious faith. There are some

—more perhaps in number—who look forward to a moral equality, who hope and expect that there will be a period when everybody in India will subscribe to the same moral creed, and entertain the same ideas as to honour, as to veracity, as to the obligation of promises, as to mercy and justice, as to that duty of tenderness to the weak which is incumbent on the strong. But those epochs are still distant, one probably much more distant than the other. Meantime the equality which results from intellectual cultivation is always and at once possible. Be sure that it is a real equality. No man ever yet genuinely despised, however he might hate, his intellectual equal. In Europe, the only community, which, so far as I see, is absolutely undivided by barriers of race, of nationality, of prejudice, of birth and wealth, is the community of men of letters and of science. The citizens of that Republic have before now corresponded with each other and retained their friendships, while the deadliest wars were separating their fellow-countrymen. I have heard that they are even now corresponding in the midst of the bloody conflict which desolates America. The same influences which can overpower the fierce hatreds bred by civil war can assuredly beat down the milder prejudices of race and colour, and it is as fountains of such influences that I believe the Universities will count for something, if they do count for anything, in the history of British India.

hardly do a greater evil in a short time than by tempting my Native audience to doubt the advantages of education, simply because their reiteration has become tedious. It is not, then, because I doubt these general advantages any more than other Vice-Chancellors, than Mr. Ritchie, or Sir James Colville, or Lord Canning, but because no one here doubts them, that I put them aside to-day. What I wish to do now is, simply to say a few words to each class of the graduates who have just taken their degrees, as to the separate and special training which they have passed through.

Naturally, the first class to which I should wish to address myself would be the Graduates in Law—those who are about to join my own profession. Most of you are aware that the number of those gentlemen who have just taken their degrees in law, considerable as it is, does not distantly represent the number of those who are destined, in one way or another, to follow the profession of law. Probably a large majority of the Graduates in Arts, of those who have just taken their degrees, and even of those who are studying in the Colleges, will become lawyers in some time, either as members of the Judicial service, or as pleaders, or as persons attached to the establishments of the various law Courts. Now, I know that there are many among my own countrymen who think that these crowds of Natives flocking to the law

young Native for the pursuit of law is now placed beyond question, although, of course, there has not been quite time to reach the highest level of legal accomplishment. A gentleman who may be supposed to speak with more authority than any one in India on this subject, Sir Barnes Peacock, the Chief Justice of Bengal, informed me once that an average legal argument by Native Vakeels in the Appellate High Court was quite up to the mark of an average legal argument in Westminster Hall; and that is very high praise indeed. On the other hand, complaints do reach me—these complaints are of course more addressed to the Native Bar of the country districts than to the Native Bar of the Presidency Towns—of a tendency to prefer subtlety to breadth, and of an over-love for technicality. Now, I should like to say a few words about this fault of over-technicality and over-subtlety, which I know, of course, to be the fault attributed to all lawyers by laymen. Perhaps I shall surprise some of you if I say that, if I were asked to give a definition of law to persons quite ignorant of it —I mean, of course, a rough and a popular, not a scientific definition or description—I should say that law is common sense. Of course, that is only true with very considerable reservations and abatements. If is not absolutely true even in England, where law has been cultivated for centuries by the flower of the national intellect, an intellect wedded, above all

things, to common sense. And again, whatever the result of the admirable Codes we are introducing, it is far from being true here. But still, with all reservations and all abatements, the proposition that law is common sense is much truer than any one looking at the subject from outside can possibly conceive. What conceals this from laymen is the fact that law, being not simply a science to be learned, but an art to be applied, has, like all arts, to be thrown into technical forms. Technicalities are absolutely indispensable to lawyers, just as the ideas of form, and proportion, and colour have to be thrown into a technical shape before they can give birth to painting or sculpture. A lawyer cannot do without technical rules, any more than a sculptor or a painter; but still, it is universally true that a disposition to overrate technicalities, or to value them for their own sake, is the characteristic mark of the journeyman, as distinguished from the artist. A very technical lawyer will always be a third-rate lawyer. The remedy, then, which I would apply to this alleged infirmity of the Native legal mind is simply this—always prefer the substance to the accident. If you are tempted to value a particular legal conclusion for its subtlety or (what sometimes comes to the same thing) its oddity or perversity, rather than its reasonableness, you may always safely suspect yourself. Technical rules will sometimes lead to perverse results, for

technicalities framed in one generation occasionally fail to give the results expected from them in another, and, of course, technicalities reasonable in one quarter of the world sometimes do not serve their purpose in another. But still, after all, the grand criterion of legal soundness is common sense, and if you are inclined to employ an argument, or to draw an inference, or to give an opinion which does not satisfy the test, which is out of harmony with experience and with the practical facts of life, I do not say, reject it absolutely, but strongly suspect it, and be sure that the presumption is heavily against it.

I can speak to the next class of graduates, the medical graduates, with much less confidence. I suppose all of us feel that Medicine is a subject in which our interest is out of all proportion to our knowledge. Yet there is one complaint, which I think that a younger generation of medical men are likely to hear more frequently and more impatiently made than did their predecessors. A friend of mine once, in this very room, though to a very different audience, said he had no belief in medicine, that it was an art which made no progress. Now, I know that medical men, conscious as they are of daily additions to their knowledge, are apt to regard such complaints as the fruit of presumptuous ignorance; but it may be worth while to examine the particle of truth which makes such a view of this art possible

significance. Perhaps it would be well if the misunderstanding were cleared up, and language were used on both sides which would reconcile the justifiably unqualified language of medical men as to the progress of their art, with the not unjustifiable impatience of those who are sometimes tempted to think that it does not move at all.

There remains one class, the largest of all, the graduates in Arts. Since their education is only introductory to pursuits and walks of life to be followed afterwards, I can only speak to them in general language, and therefore with but slight effect. But there are some peculiarities in the course which they have gone through, which make a considerable impression on a person like myself, who am pretty well acquainted with the analogous course of the English Universities. The peculiarity of the course of the University of Calcutta which most strikes me is this—the nearer equality on which the Calcutta course, as compared with that of Oxford or Cambridge, places the subjects of study, which are there classed as the new and the old. Nominally, our course is just the same as that of the English University. We examine in classics, mathematics, history, physical science, and (what does not seem to me a correct term) moral science. But at Oxford and Cambridge two of these subjects, classics and mathematics, are much older than the others, and the new

branches of study have a hard fight to maintain their credit and popularity against the prestige of the old. It is found still, I believe, very difficult to get either teachers or pupils to attach the same importance to eminence in the new studies which attaches to distinction in classics or in mathematics. Hence it is, that there is no commoner subject of discussion among persons interested in education than the relative priority which should be assigned to those branches of knowledge—which of them ought to take the lead in point of honour, and which is able to furnish the best training for the mind; and I have seen recently, from some papers which came from England, in particular from the Report of the Public Schools' Commissioners, that the controversy is still going on. I will not state the arguments used in England, which would strike many of you as somewhat conventional and traditional. But still, the question, which of these branches of study is really destined to take precedence over the rest, and to bring the others under its influence, is a question of interest, and in India even of some importance. Of course, but few graduates in Arts here, as in England, will follow in after-life the studies of their period of education, nor is it desirable that many should follow them. Some few, however, will do it with advantage, and it is to this minority that I address the remarks I am going to make.

I will take, first, one of the branches of study which enter into our course, History, and I select it, not because it is the one I mean, but because there is probably no one in the room who has not some elementary knowledge of its nature and objects. If the question were put, Why should history be studied? the only answer, I suppose, which could be given is, Because it is true: because it is a portion of the truth to which it is the object of all study to attain. It is, however, an undoubted fact that the quality of the truth expected from history has always been changing and cannot be said to be even now settled. Beyond all question, it grew every where out of Poetry, and long had its characteristics even in the Western world. In the East, as my Native auditors know, down to comparatively modern times the two forms of truth, the poetical and historical form, were incapable of being disentangled from one another. In the West, which alone has seen the real birth and growth of history, long after it ceased to be strictly poetical, it continued to be dramatic; and many of the incomparable merits of those historians to whom I see many of the students have been introduced by their recent studies, the great historians of the ancient Western world, as for example their painting and analysis of character, are quite as much due in reality to their sense of dramatic propriety as to their love of pure truth. In modern

the Astronomer, of the Physiologist, and of the Historian. The great principle which underlies all our knowledge of the physical world, that Nature is ever consistent with herself, must also be true of human nature and of human society which is made up of human nature. It is not indeed meant that there are no truths except of the external world, but that all truth, of whatever character, must conform to the same conditions; so that, if indeed history be true, it must teach that which every other science teaches, continuous sequence, inflexible order, and eternal law.

This brings me to the point to which I was desirous of leading you. Among all our subjects of study, there is no doubt as to which is the one to which belongs the future. The fact is that within the last fifteen or twenty years, there has arisen in the world of thought a new power and a new influence, not the direct but the indirect influence of the physical sciences—of the sciences of experiment and observation. The landmarks between the fields of knowledge are being removed; the methods of cultivation are more than suspected to be the same for all. Already the most surprising results have been achieved by applying scientific modes of inquiry to provinces of study once supposed to be furthest removed from science; and if there is any branch of knowledge which refuses to answer to these new

mathematicians in India strongly exhibit a similar preference. This displacement of the true order of study is often defended at home on the ground that a pure mathematical training encourages accurate habits of thought and reasoning. Now, it is perfectly true that mathematical study, more than any other study, produces habits of sustained thought and attention, without which no great intellectual progress of any kind is possible. But the modes of reasoning followed in mathematics happen to be signally unlike those followed in any other walk of life or province of inquiry, and it would be well, I think, if teachers in India kept steadily before their pupils the truth that, except for the mighty aid they lend to physical science, and except for their value in bracing the faculty of attention, exercises in pure mathematics are as profitless an exercise as writing Latin or Sanscrit verses, without the same beneficial effect on the taste.

In regard to the influence of the new methods on History, the only observation I will make is that their effect has been to change, so to speak, its perspective. Many portions of it which had but small apparent value are exalted into high esteem, just as a stone may be of greater interest to a geologist than a mountain, a weed than a flower to a botanist, a fibre than a whole organism to a physiologist, because they place beyond question a natural law or illustrate

evidently depends on physical knowledge. If the mind of man had been so constituted as to be capable of discovering only moral truths, I should have despaired of its making any permanent conquest of falsehood. Or again—which is much the same thing—if the founders of false systems of religion or philosophy had confined themselves to declaring moral errors only or false propositions concerning the unknown and unseen world, I see no reason for doubting that in most societies, at all events in Oriental societies, their empire would have been perpetual. For, so far from intellectual growth being in itself certain to destroy error, it constantly supplies it with new weapons. We may teach our students to cultivate language, and we only add strength to sophistry; we teach them to cultivate their imagination, and it only gives grace and colour to delusion; we teach them to cultivate their reasoning powers, and they find a thousand resources, in allegory, in analogy, and in mysticism, for evading and discrediting truth. Unchecked by external truth, the mind of man has a fatal facility for ensnaring, and entrapping, and entangling itself. But happily, happily for the human race, some fragment of physical speculation has been built into every false system. Here is the weak point. Its inevitable destruction leaves a breach in the whole

the fruitfulness of the discovery has sometimes been suspended for ages. All Nature witnesses to her own laws and is a witness that never can be silenced. The stars in their courses fight for truth, and if physical knowledge retained any foothold here, I should say that the statement would be true which has so often been made in another sense, and India might always be re-conquered from the sea-board of Bengal.

Nobody who shares in that belief which I impressed on a similar audience as the noblest characteristic of that one of the founders of our University who quitted us last year, a belief in the harmony of all truth, will suppose that I have been exalting the truths of physical nature at the expense of moral or any other truths. The very fact which I have been impressing upon you, that the methods of physical science are proving to be applicable to fields of thought where they once had no place, is itself an indication that all truth will, at some time, be shown to be one and indivisible. But no doubt what I have been saying does carry with it the implication that truth of all sorts does admit of intellectual appreciation —that all asserted knowledge must at all events to some extent ring true, when sounded by the intellect But who in India will deny this? Nobody, so far as I know, who ever wished or attempted any good for the people of India—the politician who wished to

But still it is quite true that conceit and scepticism are the products of an arrested development of knowledge. It is far from impossible that acute minds such as those of the educated Bengalis may come to the point of thinking that every thing is known, and that all that is known is vanity. It is principally because a scientific method of enquiry tends to correct what would be a desolating mistake that I have dwelt on this subject so long. That truth is real and certain, but that truth at the same time is infinite, is the double conviction to which enquiry conducted on scientific principles leads. There can be no manner of question that the progress of knowledge leads to the very frame of mind to which some have thought it fatal — not only to certainty, but to reverence. Whatever be your point of view, you will agree with me that to aim at any consummation short of this could be but a poor result of education by this University.

centuries upon centuries, the imagination has run riot, and much of the intellectual weakness and moral evil which afflict it to this moment, may be traced to imagination having so long usurped the place of reason. What the Native mind requires, is stricter criteria of truth ; and I look for the happiest moral and intellectual results from an increased devotion to those sciences by which no tests of truth are accepted, except the most rigid.

The only other event which I have to announce —if I can dignify it with the name of an event—is the advance through another stage of the preparations of our University building. The plans for the building have received full official sanction, and nothing now will probably delay the construction, except those impediments to rapid work which are common to all undertakings in India, whether they be public or private. I greatly regret the delay, and have from year to year stated in this place that I regretted it. But I think it just to say, that it may be explained by a naturally, and indeed, necessarily, imperfect appreciation of the rank which our claim to a building was entitled to hold among the many heavy demands for public works which press upon the Government of India. I do not suppose that anybody ever doubted that the existence of a University without a local habitation was an anomaly, or that we were entitled to a Hall for meetings like this

from the crowds which flocked to them, it would be perfectly plain from the pictures of University life preserved in the poetry of Chaucer, that the early students of Oxford and Cambridge were children of the people. And the object of those students was exactly that which is sometimes imputed to our students, as if a censure was intended. It was simply to get on in life; either to enter the Church which was then the only free field in Europe, or, a little later, to get into one of the clerkly professions that were rising up. But it was the example of the educated classes, the visible effects of education on manners and on material prosperity and its growing importance in politics which first attracted the nobility. Their first step was not to educate themselves. The first sign of interest which they showed was in the munificent endowments which they began to pour in upon learned institutions; and their next step was probably to engage learned men for the education of their children. But it was very slowly, and after much temporary reaction, that that state of things was at last reached, to which Lord Canning pointed, and under which it is undoubtedly true that the English nobility do put their children through the Universities, unless they have chosen a profession inconsistent with Academical training. But nothing could be more erroneous than to suppose, that even now Oxford and Cambridge are

probabilities for the future. There are other objections. Some of them I do not purpose to notice, because they are simply vulgar. When, for example, it is said that the Native graduates of this and other Indian Universities are conceited, I wonder whether it is considered how young they are, compared with English graduates, how wide is the difference which their education makes between them and their fellow countrymen, and therefore whether some such result might not to some extent be looked for in any climate or latitude. Certainly, the imputation which is sometimes made, that education saps the morality of the Natives, would be serious if it were true. But, not to speak of its being paradoxical on the face of it, it is against all the evidence that I (or any body else) have been able to collect. At all events, in one department of State, with which I have reason to be acquainted, it is almost a maxim governing promotion that the better educated is a candidate for judicial employment, the less likely is he to be tainted with that corruption which was once the disgrace of the Indian Courts.

But the objection which is commonest, and which most intimately concerns us here, is, that the knowledge communicated by the subordinate Colleges and verified by this University is worthless, shallow, and superficial. The course of the University of Calcutta is sometimes said to be in fault, and it is alleged, to

they are based on a mere fragment of truth; when passed about among the multitude, they have still less; and, at last, when exported hither, and repeated by the Natives in a foreign tongue, they have simply no meaning at all.

As far as I understand the word, it means nothing more than the rapid communication of knowledge,—communication, that is to say, at a rate unknown till recently. Some people, I know, would add something to the definition, and would say that cramming is the rapid communication of superficial knowledge; but the two statements will generally be found to be identical, and that they merely mean by superficial knowledge, knowledge which has been rapidly acquired. The true point, the point which really has to be proved is, whether knowledge rapidly acquired is more easily forgotten than knowledge which has been slowly gained. The point is one upon which, to some extent, everybody can judge for himself or herself. I do not assert the negative, but I am rather surprised at the readiness with which the affirmative has been usually taken for granted; no doubt, if it be true, it is a curious psychological fact, but surely there are some reasons for questioning the reality. It might plausibly be argued that knowledge slowly acquired, has been acquired at the cost of frequent intervals of inattention and forgetfulness. Now everybody knows that inattention and forgetfulness tend to become habits of the

reat improvement in England lately, and that the oks of teaching, most in use, have been purged of any gross errors both of statement and of method. ut one line of enquiry there is which has never been fficiently followed, though one would have thought antecedently the most promising of all,—the study the human mind through actual observation, and the udy of the expedients by which its capacity for reiving and retaining knowledge may be enlarged. he field of investigation has been almost wholly negcted, and therefore it may just be that we are on the e of great discoveries in education, and that the prosses of these teachers are only a rough anticipation the future. The fact that the methods of teaching llowed in England are almost wholly empirical, that r the most part they entirely neglect individual difrences of character and temperament, that they cerinly work counter to the known laws according to hich some of the mental faculties operate,—for exnple, the memory—all these facts seem to my mind to oint at possibilities and chances of improvement, hich a few persons, by expedients which, I frankly low, seem even to me somewhat ignoble, have perups had the good fortune to realize beforehand.

You will see, then, that the problem, whether hat is called cramming is an unmixed evil, is not t settled even in England. But, in India, the ommonplace imputations against it seem to me

a tenth part of the mischief and injustice entailed by the indulgence of vanity, or crotchettiness, or affectation, or indolence, on the part of the examiners.

If I had any complaint to make of the most highly educated class of Natives,—the class I mean which has received the highest European education,—a class to which our University has hardly as yet contributed many members (because it is too modern). but to which it will certainly make large additions one day—I should assuredly not complain of their mode of acquiring knowledge, or of the quality of that knowledge (except that it is too purely literary and not sufficiently scientific), or of any evil effects it may have on their character, or manners, or habits. I should rather venture to express disappointment at the use to which they sometimes put it. It seems to me that not seldom they employ it for what I can best describe as irrationally reactionary purposes. It is not to be concealed, and I see plainly that educated Natives do not conceal from themselves, that they have, by the fact of their education, broken for ever with much in their history, much in their customs, much in their creed. Yet I constantly read, and sometimes hear, elaborate attempts on their part to persuade themselves and others, that there is a sense in which these rejected portions of Native history, and usage and belief, are perfectly in harmony with the modern knowledge

the men of the Present, if they could step back into the Past. There is no one in this room to whom the life of a hundred years since would not be acute suffering, if it could be lived over again. It is impossible even to imagine the condition of an educated Native, with some of the knowledge and many of the susceptibilities of the nineteenth century — indeed, perhaps, with too many of them—if he could recross the immense gulf which separates him from the India of Hindu poetry, if indeed it ever existed. The only India, in fact, to which he could hope to return—and that retrogression is not beyond the range of conceivable possibilities—is the India of Mahratta robbery and Mahomedan rule.

I myself believe that European influences are, in great measure, the source of these delusions. The value attached in Europe to ancient Hindu literature, and deservedly attached for its poetical and philological interest, has very naturally caused the Native to look back with pride and fondness on the era at which the great Sanscrit poems were composed and great philosophical systems evolved. But unquestionably the tendency has its chief root in this,—that the Natives of India have caught from us Europeans our modern trick of constructing, by means of works of fiction, an imaginary Past out of the Present, taking from the Past its externals, its outward furniture, but building in the sympathies, the susceptibilities, and

writers glorifying by fine names things which are simply abominable. But I allude to something less revolting than this. There are Native usages, not in themselves open to heavy moral blame, which every educated man can see to be strongly protective of ignorance and prejudice. I perceive a tendency to defend these, sometimes on the ground that occasionally and incidentally they serve some slight practical use, sometimes because an imaginative explanation of them can be given, sometimes and more often for the reason that something superficially like them can be detected in European society. I admit that this tendency is natural and even inevitable. The only influence which could quite correct it, would be the influence of European ideas conveyed otherwise than through books; in fact through social intercourse. But the social relations between the two races, at least of India, are still in so unsatisfactory a condition, that there is no such thing, or hardly such a thing, as mixed Native and European society. A late colleague of mine, Sir Charles Trevelyan, thought that things in this respect were worse when he was lately here than when he was first here. When he was first here, he saw educated Natives mixing on equal terms with educated Europeans. When he came out a second time to India, there was nothing of the kind. But perhaps that happier state of things was caused by the very smallness of educated Native society. As educated society among Natives has become larger it

even to a comparatively humble graduate of this University. They may be safely persuaded that, in spite of discouragements which do not all come from themselves or their countrymen, their real affinities are with Europe and the Future, not with India and the Past. They would do well once for all to acquiesce in it, and accept, with all its consequences, the marvellous destiny which has brought one of the youngest branches of the greatest family of mankind from the uttermost ends of the earth to renovate and educate the oldest. There is not yet perfect sympathy between the two, but intellectual sympathy, in part the fruit of this University, will come first, and moral and social sympathy will surely follow afterwards.

phraseology) the commands of the Sovereign are not issued through the special organ called the Legislature, another set of commands will be issued through Courts of Justice; and, so far as regards India, these last commands will, from the nature of the case, scarcely ever even make a pretence of being adjusted to equity or expediency. The obscurity with which what is really a simple truth appears to be apprehended is probably due to our habit of assuming that the common distinction between executive, legislative, and judicial power is absolutely accurate and exhaustive. This famous classification of the forms of power, which, if it did not originate with Montesquieu, is indebted to him for its wide popularity, had doubtless the effect of materially clearing men's ideas when they first became familiar with it, and it has had great influence subsequently on several legislative experiments of the first order of importance, among them on the Constitution of the United States. But the imperfection which lurks in it, and which has been exposed by the searching analysis of Austin, is nowadays a serious impediment to accurate juridical thought, and has among other things stood much in the way of serious inquiry into the exact nature of that process of judicial interpretation or construction which has constantly the practical effect of legislation.

The earlier enactments of the Indian Government

though the authorities constantly contradicted one another, and the rules themselves were stated with extreme looseness. There was, for example, a very copious law of Succession after Death. The most distinct effect of continued judicial construction on provinces of law which were in this state has been, as I have attempted to show in a recent work ('Village-Communities in the East and West,' *ante*, pp. 51 *et seq.*), greatly to extend the operation of semi-sacred collections of written rules, such as the treatises of Mahometan doctors, or of the Brahminical commentators on Manu, at the expense of local customs which had been practised over small territorial areas. But there were many branches of law in which the political officers of the British Government could find few positive rules of any sort; or, if any could be discovered, they were the special observances of limited classes or castes. Thus there was no law of Evidence, in the proper sense of the words; hardly any law of Contract; scarcely any of Civil Wrong. The civil procedure, so far as it was authoritatively prescribed, consisted in little more than vague directions to do justice. The criminal law of the Hindus, such as it was, had been entirely superseded by the semi-military system of the Mahometans. Into all the departments of law which were thus scantily filled the English law steadily made its way, in quantities nearly proportioned to the original barrenness of each of them. The

enormously to quicken the springs of social activity, principally by breaking up that common life of families and communities by which they had been retarded. All sorts of new questions were raised, and moot points started in civil affairs; and when principles were required for the settlement of the resulting controversies, they were necessarily taken from English law, for, under the circumstances, they could be found nowhere else. The points which require to be observed are—first, that the true revolutionary agent in India has been neither the Executive Government nor the Legislature, but the Court of Justice, without which the existence of British rule in India can hardly be conceived; and secondly, that the only possible corrective of the process of change is formal legislation. It is quite possible to hold a respectful opinion of many parts of English law, and yet to affirm strongly that its introduction by courts of justice into India has amounted to a grievous wrong. The English law is a system of colossal dimensions. The community which immediately obeys it has ceased to profess to be acquainted with it, and consents to be dependent for knowledge of it on various classes of experts. These experts do not affect to practise their art without access to law libraries, consisting when complete of many thousand volumes. Now, there are probably half-a-dozen law-libraries at most in all India. The books they contain are written in a foreign language, and the persons able to consult these books and

collected with difficulty from isolated decisions reported in a foreign language. The theory of judicial evidence is constantly misstated or misconceived even in this country, and the English law on the subject is too often described as being that which it is its chief distinction not to be—that is, as an Organon, as a sort of contrivance for the discovery of truth which English lawyers have patented. In India, several special causes have contributed to disguise its true character. There is much probability that our English law of Evidence would never have come into existence if we had not continued much longer than other Western societies the separation of the province of the judge from the province of the jury; and, in fact, the English rules of evidence are never very scrupulously attended to by tribunals which, like the Court of Chancery, adjudicate both on law and on fact, through the same organs and the same procedure. Now, an Indian functionary, when he acts as a civil judge, and for the most part when he acts as a criminal judge, decides both on law and on fact. He it is who applies the rules of evidence to himself, and not to a body distinct from himself, and he has often to perform the delicate achievement of preventing his decision from being affected by sources of information which in reality have been opened to him. Nor is this all. The civil servant of the Indian Government is, through much of his career, an administrative officer, and, indeed, his duties are

this belief to influence them, not only in their judicial, but in their executive and administrative duties. It is often said in India that the servile reliance upon the English law of Evidence which nowadays characterises many of the servants of Government, is producing a paralysis of administration; and though the assertion may be exaggerated, it is far from impossible that it may have a basis of truth. I have myself heard an eminent English Common Law judge observe that, in the exercise of the new jurisdiction on election petitions, he had to maintain a constant struggle with his own habits of mind to preserve his common sense when adjudicating on facts without a jury, and to keep himself from dealing with them exactly as he would have done at Nisi Prius.

Two things were indispensable for the correction of these evils. One was to alleviate the labour of mastering the law of Evidence, whatever form it might take, and, so far as might be possible, to place the civil servant overwhelmed by multifarious duties, the native judge, and the native practitioner on a level with the English lawyers of the Presidency towns, who have hitherto virtually claimed a monopoly of knowledge on the subject—a monopoly which the great mass of British settlers in India have been eager to concede to them for political reasons not necessary to discuss here. The Indian Evidence Act has been framed and enacted with this object. It may be

media of proof, to 'statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry,' and to 'documents produced for the inspection of the Court.' The improvement in phraseology thus effected is of much value. English lawyers are in the habit of using the one name 'evidence' for the fact to be proved, as well as for the means by which it is to be proved, and thus many of the fundamental expressions of the English law of Evidence have undoubtedly contracted a double meaning. The employment of 'primary evidence' sometimes to indicate a relevant fact, and sometimes to signify the original of a document as opposed to a copy, may not be of much practical importance, but the ambiguity in the opposition commonly set up between 'circumstantial evidence' and 'direct evidence' is really serious. 'Circumstantial evidence' is ordinarily used to signify a fact, from which some other fact is inferred; 'direct evidence' means a man's testimony as to that which he has perceived by his own senses. In the first phrase, therefore, 'evidence' means a relevant fact of a particular kind; in the second, it means a particular mode of proving a fact. Mr. Stephen justly remarks that this clumsiness of expression is the source of the vulgar but most dangerous error which assumes that circumstantial and direct evidence admit of being contrasted in respect of their cogency, and

evidence. These classes of facts are styled respectively by the Act, 'facts in issue' and 'relevant facts.' 'Facts in issue' are the fact or group of facts to which, if its existence be proved, the substantive law of a given community attaches a definite legal consequence, generally an obligation or a right. Thus, in a litigation concerning lands in England, the fact that A is the eldest son of B may be in issue; if it be proved, there arises the inference under the law of England that A is the Heir-at-Law of B, and has the rights involved in that status. If, again, A proffers a promise to B, and B accepts it, and the understanding between them be reduced to writing with certain formalities, the result of these facts—if either undisputed or established by evidence—is a Contract under Seal, to which the law annexes a definite set of legal consequences. But there are other facts, besides the facts in issue, which may have to be proved before a court of justice. These are facts which affect the probability of 'facts in issue,' or, to put it otherwise, have the capacity for furnishing an inference respecting them. Facts which possess such a capacity are called in the Evidence Act 'relevant facts.' Let us suppose that A has been shot, and it is alleged that he was shot by B with a particular intention or state of mind. The first fact being undisputed, the second, the homicide by B, and the third, B's intention—which is a 'fact' under the

in no essential respect from the problems of scientific inquiry, and, like them, would consist in a process of inferring unknown causes from known effects. Mr. Huxley has observed that the methods of science are not distinguished from the methods which we all habitually, though carelessly, employ in investigating the facts of common life, and that the faculties and processes by which Adams and Leverrier discovered a new planet, and Cuvier restored the extinct animals of Montmartre, are identical with those by which a policeman detects a burglar, or a lady infers the upsetting of an inkstand from a stain on her dress. Mr. Stephen justly affirms that Mr. Huxley's remarks admit of an inverse application, and urges the importance of understanding that the investigation of matters of every-day occurrence, which is the business of the judge (and, I may add, of the historian), is conducted, when it is properly conducted, according to the methods of science. The most general rules which can be laid down with respect to judicial inquiry are those which belong to the Logic of Facts as set forth by Mr. John Stuart Mill. Mr. Stephen, who writes in part for beginners, has abstracted in his Introduction Mr. Mill's account of Induction and Deduction, and specially of the inductive methods of Agreement and Difference. After illustrating the application of Mr. Mill's principles to judicial inquiries, he adds some observations of his own, which

and will be combined with those of others before any inference is drawn from them. More than all, the evidence of a scientific witness is not taken at all unless his powers of observation are known to have been tested, and the facts to which he speaks are for the most part simple and ascertained through special contrivances provided for the purpose. No one of these securities for accuracy exists in the case of a witness in a court of justice. He is rarely a man of trained observation. His passions are often strongly enlisted in favour of one view of the question to be decided. He has the power of shaping his evidence so as to make it suggest the conclusion he desires. Much of what he states is safe from contradiction, and the facts to which he deposes, being portions of human conduct, are constantly in the highest degree intricate.

Up to this point the advantage is wholly on the side of the scientific inquirer. But Mr. Stephen has some acute observations on some special facilities which materially assist those who are engaged in judicial investigations. The rules by which such persons guide themselves are founded on propositions concerning human nature which are only approximately true; these rules are stated with little precision, and must be constantly qualified before they are applied. But then they are of much greater practical use than would be rough generalisations concerning

would cover the whole of the field covered by a perfect theory of judicial inference. As Mr. Stephen has said, all facts of every sort, material and moral, may for all we know be connected together as antecedents and consequents, and a supernatural intelligence might perhaps safely infer any one fact from any other. But a Law of Evidence is necessarily limited by practical experience of human nature and conduct, and a good law of the kind, by its general or particular descriptions of relevant facts, ought not to admit any fact whose capacity for supplying a safe inference has been shown by experience to be dangerously slight; nor ought it, on the other hand, by over-strict or narrow definitions, to exclude any fact of a class upon which sound inferences are found to be practically based in the commerce of life. What are the merits, in this respect, of the English Law of Evidence—the part of our law which has been most indiscriminately praised, and at some periods of its history most bitterly attacked—is much more easily seen in the Indian Evidence Act than in compendia of older date. The Indian measure may be described as setting forth the rules of our law affirmatively instead of negatively. The ordinary text-books of the law of evidence, adopting the language of judicial decision, represent the law as in principle a system of exclusion. They place in front of it one or two broad general *rules*, shutting out testimony of a certain

unquestionably brings into much clearer light the true merits of the English law of evidence. That law in former times contained several absurd rules of arbitrary exclusion, or, as it might be put, it irrationally denied the relevancy of certain classes of facts; but subject to these drawbacks, it always included the general rule that the facts in issue, and all facts from which they might be inferred, might be proved; and the existence of this great positive rule, which is no where expressly declared by the English authorities, plainly appears through the arrangement of the Evidence Act. The nature, too, of the minor rules, which are usually stated as exceptions to dominant rules of exclusion, but which here affirm the relevancy of facts of a particular kind, is much more distinctly shown, and the impression which they make is extremely favourable to them. All these rules are founded on propositions concerning human nature and conduct which are approximately or roughly true. Such propositions are established inductively in order that they may be employed deductively in judicial inquiries. When we carefully examine such of them as are at the base of the English rules, and of the limitations and exceptions to which these rules are subject, we find the strongest reason for admiring the sagacity of the English lawyers who matured and framed them. It is quite true that, but for the influence of Bentham, they would still be intermixed with

fact from another which has been proved beyond dispute. It is in the passage from the statements of the witnesses to the inference that those statements are true, that judicial inquiries generally break down. The English procedure of examination and cross-examination is doubtless entitled to the highest praise; but, on the whole, it is the rarest and highest personal accomplishment of a judge to make allowance for the ignorance or timidity of witnesses, and to see through the confident and plausible liar. Nor can any general rules be laid down for the acquisition of this power, which has methods of operation peculiar to itself, and almost undefinable. I have heard barristers in India assert—and Mr. Stephen tells the same story of a barrister in Ceylon—that they knew Native witnesses to be perjuring themselves whenever their toes begin to twitch, and, country for country, the tests which English judges and counsel have taught themselves to apply with practical success are hardly less singular. But the caution of the English law in avoiding express rules concerning this particular process of inference has not always been displayed by the legal systems of other countries, or always appreciated by speculative juridical critics in our own. Some elaborate attempts to connect the accumulation of testimony with the theory of probabilities have proceeded from the very mistake which the English law has escaped; and the error is at the

largest part of the law of evidence has grown up, so to speak, under the shadow of this great rule of exclusion, and consists of exceptions to it matured and stated with a caution which is the true secret of the value which this branch of law undoubtedly possesses. A complete account of it cannot in fact be given, unless the mode of its development be kept in view. We could not otherwise, for example, explain the disproportion between its component parts. We find in the Indian Evidence Act a few permissive rules of the widest application, and by their side a multitude of minor rules, of which some relate to matters which are almost trivial. A rule declaring the relevancy of commercial accounts kept in a particular way, is grouped with such a rule as affirms the relevancy of 'facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction.' It would be impossible to understand the number of carefully limited, but very minute, permissive rules, without reference to their origin in a rule of exclusion; and, indeed, it is morally certain that if the English lawyers, instead of slowly framing exceptions to rules shutting out testimony, had set themselves to lay down a series of affirmative propositions as to the classes of facts from which inferences can be

about them—has special qualifications for deciding on them, supplied to him by experience, study, or the peculiarities of his own character, which are of more value to him than could be any general direction from book or person. For this reason, a policeman guiding himself by the strict rules of evidence would be chargeable with incapacity, and a general would be guilty of a military crime. Again, the blending of the duties of the judge of law and of the judge of fact deprives the system of much, though not necessarily of all, of its utility. An Equity judge, an Admiralty judge, a Common Law judge trying an election petition, an historian, may employ the English rules of evidence, particularly when stated affirmatively, to steady and sober his judgment, but he cannot give general directions to his own mind without running much risk of entangling or enfeebling it, and, under the existing conditions of thought, he cannot really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it. Englishmen are extremely prone to do injustice to foreign systems of judicial administration, from forgetting the inherent difficulty of applying the English law of evidence, when the same authority decides both on law and on fact, as is mostly the case in other countries. The evidence permitted to be placed before a French jury has often furnished English lawyers with matter for surprise or merriment. But the jury is a mere

which are approximately true. When, however, we are transferring a system from England to a country so far removed from it, morally and mentally, as India, we cannot be quite sure that all the propositions which are roughly true of one people and one state of society are in the same degree true of another people and another social state. Still less can we be sure that the relative truth of rules founded on propositions of this sort is the same in the two countries. Mr. Stephen, as I have said, strongly contends that one of the most difficult processes which the judicial mind has to go through is the inference from the fact of a witness's assertion to the existence of the fact asserted by him; but still, though the principle is from the nature of the case nowhere expressly laid down, it would be unreasonable to doubt that witnesses in England very generally speak the truth, and the assumption that they do speak it is perpetually acted upon. On the other hand, the statements of a person who is not called as a witness are, subject to exceptions, inexorably excluded by English law. It is, therefore, considered in this country, and it is probably true, that a fact deposed to by a witness in court is more likely to exist than a fact reported at second-hand. But it is a great deal more than doubtful whether this assertion can be confidently made of India. The inference from the statement of a witness to the truth of the statement, which is not

of relevancy should, in virtue of principles admitted to be at best only roughly true, occasionally forbid an Indian Court to take into account facts which furnish inferences a great deal safer than all the evidence which the law unhesitatingly lets in. I myself have known a heavy mercantile suit to be tried by a judge who was intimately persuaded that the witnesses on each side were telling a concerted story in which there was a large element of falsehood; but what was its amount, the facts before the Court did not enable him to decide. It was known, however, that a person of good repute had made a statement concerning the matter in dispute under perfectly unsuspicious circumstances, which would have decided the case; but he was shown to be alive, and he was not called as a witness. The theory of the law was that, as he was in a foreign country, a commission should issue for his examination. The fact was that he had settled as a religious ascetic in Bokhara, and in Bokhara as it was before the Russian advance in Central Asia! I imagine, therefore, that the more general application of the rules of evidence which will follow the enactment of the Evidence Act is extremely likely to lead to still further relaxations of the so-called rule against 'hearsay,' as required under the special circumstances of India. Nor do I suppose that Mr. Stephen is of a very different opinion. He introduced into the Evidence Act a peculiar provision (sect. 165), under

the whole business of inference from the known to the unknown, is scientific inquiry into the facts of nature; but though its influence, great already, is destined to be much greater, it is altogether modern. Englishmen have for long had, not indeed an adequate, but a valuable substitute for it in their law of evidence. I do not deny that they in some degree owe this advantage to an accident. The early rules of exclusion adopted by our law, though founded on views of human conduct which contained a considerable amount of truth, were soon seen to require limitation if they were to be brought into still further harmony with human nature; and thus the great practical sagacity which has always distinguished English lawyers came to be employed on the modification of these rules—always, however, restrained and sobered by their veneration for dominant principles long since judicially declared. The system evolved had many defects, some of which have been removed; but even in its unimproved state it produced a certain severity of judgment on questions of fact which has long been a healthy characteristic of the English mind. The experience of any observant person will probably supply him with instances in point; but I take a less familiar example in the specially English school of history. It has certainly been strongly affected by canons of evidence having their origin in the law. Nobody can doubt that the peculiarities thus produced

ROMAN LAW AND LEGAL EDUCATION.[1]

If it were worth our while to inquire narrowly into the causes which have led of late years to the revival of interest in the Roman civil law, we should probably end in attributing its increasing popularity rather to some incidental glimpses of its value which have been gained by the English practitioner in the course of legal business, than to any widely diffused or far-reaching appreciation of its importance as an instrument of knowledge. It is most certain that the higher the point of jurisprudence which has to be dealt with, the more signal is always the assistance derived by the English lawyer from Roman law; and the higher the mind employed upon the question, the more unqualified is its admiration of the system by which its perplexities have been disentangled. But the grounds upon which the study of Roman jurisprudence is to be defended are by no means such as to be intelligible only to the subtlest intellects, nor do they await the occurrence of recondite points of law in order to disclose themselves. It is believed

[1] (Published in the Cambridge Essays for 1856.)

foreign jurisprudence interpreted by the old English common-lawyers would soon cease to be foreign, and the Roman law would lose its distinctive character with even greater rapidity than any other set of institutions. It will be easily understood that a system like the laws of Rome, distinguished above all others for its symmetry and its close correspondence with fundamental rules, would be effectually metamorphosed by a very slight distortion of its parts, or by the omission of one or two governing principles. Even though, therefore, it be true—and true it certainly is—that texts of Roman law have been worked at all points into the foundations of our jurisprudence, it does not follow, from that fact, that our knowledge of English law would be materially improved by the study of the *Corpus Juris*; and besides, if too much stress be laid on the historical connexion between the systems, it will be apt to encourage one of the most serious errors into which the inquirer into the philosophy of law can fall. It is not because our own jurisprudence and that of Rome were *once* alike that they ought to be studied together—it is because they *will be* alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we in England are slowly, and perhaps unconsciously or unwillingly, but still steadily and certainly accustoming ourselves to the same modes of legal thought and to

conceptions of legal principle to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation.

The attempt, however, to explain at length why the flux and change which our law is visibly undergoing furnish the strongest reasons for studying a body of rules so mature and so highly refined as that contained in the *Corpus Juris*, would be nearly the same thing as endeavouring to settle the relation of the Roman law to the science of jurisprudence; and that inquiry, from its great length and difficulty, it would be obviously absurd to prosecute within the limits of an Essay like the present. But there is a set of considerations of a different nature, and equally forcible in their way, which cannot be too strongly impressed on all who have the control of legal or general education. The point which they tend to establish is this:—the immensity of the ignorance to which we are condemned by ignorance of Roman law. It may be doubted whether even the best educated men in England can fully realise how vastly important an element is Roman law in the general mass of human knowledge, and how largely it enters into and pervades and modifies all products of human thought which are not exclusively English. Before we endeavour to give some distant idea of the extent to which this is true, we must remind the reader that the Roman

law is not a system of cases, like our own. It is a system of which the nature may, for practical purposes, though inadequately, be described by saying that it consists of principles, and of express written rules. In England, the labour of the lawyer is to extract from the precedents a formula, which, while covering *them*, will also cover the state of facts to be adjudicated upon; and the task of rival advocates is, from the same precedents, or others, to elicit different formulas of equal apparent applicability. Now, in Roman law no such use is made of precedents. The *Corpus Juris*, as may be seen at a glance, contains a great number of what our English lawyers would term cases; but then they are in no respect sources of rules—they are instances of their application. They are, as it were, problems solved by authority in order to throw light on the rule, and to point out how it should be manipulated and applied. How it was that the Roman law came to assume this form so much sooner and more completely than our own, is a question full of interest, and it is one of the first to which the student should address himself; but though the prejudices of an Englishman will probably figure to him a jurisprudence thus constituted as, to say the least, anomalous, it is, nevertheless, quite as readily conceived, and quite as natural as the constitution of our own system. In proof of this, it may be remarked that

the English common law was clearly conceived by its earliest expositors as wearing something of this character. It was regarded as existing *somewhere* in the form of a symmetrical body of express rules, adjusted to definite principles. The knowledge of the system, however, in its full amplitude and proportions was supposed to be confined to the breasts of the judges, and the lay-public and the mass of the legal profession were only permitted to discern its canons intertwined with the facts of adjudged cases. Many traces of this ancient theory remain in the language of our judgments and forensic arguments, and among them we may perhaps place the singular use of the word 'principle' in the sense of a legal proposition elicited from the precedents by comparison and induction.

The proper business of a Roman jurisconsult was therefore confined to the interpretation and application of express written rules—processes which must, of course, be to some extent employed by the professors of every system of laws—of our own among others, when we attempt to deal with statute law. But the great space which they filled at Rome has no counterpart in English practice; and becoming, as they did, the principal exercise of a class of men characterised as a whole by extraordinary subtlety and patience, and in individual cases by extraordinary genius, they were the means of produc-

ing results which the English practitioner wants centuries of attaining. We, who speak without shame—occasionally with something like pride—of our ill success in construing statutes, have at our command nothing distantly resembling the appliances which the Roman jurisprudence supplies, partly by definite canons and partly by appropriate examples, for the understanding and management of written law. It would not be doing more than justice to the methods of interpretation invented by the Roman lawyers, if we were to compare the power which they give over their subject-matter to the advantage which the geometrician derives from mathematical analysis in discussing the relations of space. By each of these helps, difficulties almost insuperable become insignificant, and processes nearly interminable are shortened to a tolerable compass. The parallel might be carried still further, and we might insist on the special habit of mind which either class of mental exercise induces. Most certainly nothing can be more peculiar, special, and distinct than the bias of thought, the modes of reasoning, and the habits of illustration, which are given by a training in the Roman law. No tension of mind or length of study which even distantly resembles the labour of mastering English jurisprudence is necessary to enable the student to realise these peculiarities of mental view; but still they cannot be acquired without some effort, and

the question is, whether the effort which they demand brings with it sufficient reward. We can only answer by endeavouring to point out that they pervade whole departments of thought and inquiry of which some knowledge is essential to every lawyer, and to every man of decent cultivation.

In the first place, it is to be remarked, that all discussion concerning Moral Philosophy has for nearly two centuries been conducted on the Continent of Europe in the language and according to the modes of reasoning peculiar to the Roman Civil Law. Shortly after the Reformation, we find two great schools of thought dividing this class of subjects between them. The most influential of the two was at first the sect or school known to us as the Casuists, all of them in spiritual communion with the Roman Catholic Church, and nearly all of them affiliated to one or other of her religious orders. On the other side were a body of writers connected with each other by a common intellectual descent from the great author of the treatise *De Jure Belli et Pacis*, Hugo Grotius. Almost all of the latter were adherents of the Reformation, and, though it cannot be said that they were formally and avowedly at conflict with the Casuists, the origin and object of their system were, nevertheless, essentially different from those of Casuistry. It is necessary to call attention to this difference, because it involves the question of

the influence of Roman law on that department of thought with which both systems are concerned. The book of Grotius, though it touches questions of pure Ethics in every page, and though it is the parent, immediate or remote, of innumerable volumes of formal morality, is not, as is well known, a professed treatise on Moral Philosophy; it is an attempt to determine the Law of Nature, or Natural Law. Now, without entering upon the question, whether the conception of a Law Natural be not exclusively a creation of the Roman jurisconsults, we may lay down that, even on the admissions of Grotius himself, the dicta of the Roman jurisprudence as to what parts of known positive law must be taken to be parts of the Law of Nature, are, if not infallible, to be received, at all events, with the profoundest respect. Hence the system of Grotius is implicated with Roman law at its very foundation; and this connexion rendered inevitable—what the legal training of the writer would perhaps have entailed without it—the free employment in every paragraph of technical phraseology, and of modes of reasoning, defining, and illustrating, which must sometimes conceal the sense, and almost always the force and cogency, of the argument from the reader who is unfamiliar with the sources whence they have been derived. On the other hand, Casuistry borrows little from Roman law. A few technical expressions, of Roman origin, have penetrated into

its language through the medium of the Canon law; but the form of the argument in the Casuistical writers is mostly taken from the course of a theological disputation in one of the academical schools, and the views of morality contended for have nothing whatever in common with the undertaking of Grotius. All that philosophy of right and wrong which has become famous, or infamous, under the name of Casuistry, had its origin[1] in the distinction between Mortal and Venial Sin. A natural anxiety to escape the awful consequences of determining a particular act to be mortally sinful, and a desire, equally intelligible, to assist the Roman Catholic Church in its conflict with Protestantism by disburthening it of an inconvenient theory, were the motives which impelled the authors of the Casuistical philosophy to the invention of an elaborate system of criteria, intended to remove immoral actions, in as many cases as possible, out of the category of mortal offences, and to stamp them as venial sins. The fate of this experiment is matter of ordinary history. We know that the distinctions of Casuistry, by enabling the priesthood to adjust spiritual control to all the varieties of human character, did really confer on it an influence with princes, statesmen, and

[1] This subject is fully and clearly discussed by Mr. Jowett, *Epistles of St. Paul*, Vol. ii., pp. 351, 352.

generals unheard of in the ages before the Reformation, and did really contribute largely to that great reaction which checked and narrowed the first successes of Protestantism. But beginning in the attempt, not to establish, but to evade—not to discover a principle, but to escape a postulate—not to settle the nature of right and wrong, but to determine what was not wrong of a particular nature,—Casuistry went on with its dexterous refinements till it ended in so attenuating the moral features of actions, and so belying the moral instincts of our being, that at length the conscience of mankind rose suddenly in revolt against it, and consigned to one common ruin the system and its doctors. The blow, long impending, was finally struck in the *Provincial Letters* of Pascal; and since the appearance of those memorable Papers, no moralist of the smallest influence or credit has ever avowedly conducted his speculations in the footsteps of the Casuists. The whole field of ethical science was thus left at the exclusive command of the writers who followed Grotius; and it still exhibits in an extraordinary degree the traces of that entanglement with Roman law which is sometimes imputed as a fault, and sometimes as the highest of its recommendations, to the Grotian theory. Many inquirers since Grotius's day have modified his principles, and many, of course, since the rise of the Critical Philosophy, have quite deserted them; but even those who

have departed most widely from his fundamental assumptions have inherited much of his method of statement, of his train of thought, and of his mode of illustration; and these have little meaning and no point to the person ignorant of Roman jurisprudence. And, moreover, as speculations on ethics are implicated with, and exercise perceptible effect on, almost every department of inquiry which is not part of physics or physiology, the element of Roman law in the ethical systems of the Continent makes itself felt in quarters where, at first sight, one is quite unable to understand its presence. There is reason to believe that we in England attach much too slight an importance to that remarkable tinge of Roman law which is all but universal in the moral and political philosophy of Continental Europe. It has often been remarked with regret or surprise that, while the learned in the exacter sciences abroad and in England have the most perfect sympathy with each other—while the physician or the mathematician in London is completely at home in the writings of the physician or the mathematician in Berlin and Paris—there is a sensible, though invisible and impalpable, barrier which separates the jurists, the moral philosophers, the politicians, and, to some extent, the historians and even the metaphysicians of the Continent from those who professedly follow the same pursuits in England. A vague reference to our insular position

gives no clue to this anomaly. The exceptional character of our political institutions but partially explains it. Some difference in the intellectual training of Englishmen from that of foreigners must lie at the bottom of it, and the general mass of our acquirements is unlike that accumulated by educated men in other countries simply in the total omission of the ingredient of Roman law.

If these views are correct, the argument for the cultivation of Roman law as a branch of English legal education will have been carried some way, for it is probably unnecessary to show at length the intimate relation of moral philosophy to jurisprudence. Perhaps the state of English thought on ethical subjects may seem to take away something from the force of the reasoning. Unquestionably, the writings of Locke, and the immense development of Locke's doctrines by Bentham, have given us an ethical system which exercises very deep influence on the intellectual condition of England, and which at the same time borrows little or nothing from Roman law. The objection, however, may be answered in several ways. While it is doubtful whether it is desirable or possible that moral philosophy should be taught in England on any one set of principles, it is certainly neither desirable nor possible that it should be taught apart from its history. Moreover, the disconnexion between the Roman law and the philosophy of Bentham

exists rather in form than in substance. The latest and most sagacious expositors of Bentham have formally declared [1] their preference for the phraseology and the methods of Roman jurisprudence; and, indeed, there would be no great presumption in asserting that much of the laborious analysis which Bentham applied to legal conceptions was directed to the establishment of propositions which are among the fundamental assumptions of the jurisconsults. Truths which the language of English law, at once ultra-popular and ultra-technical, either obscures or conceals, shine clearly through the terminology of the Roman lawyers; and it is difficult to believe that they would ever have been lost sight of, if English common sense had been protected against delusion by knowledge of a system of which common sense is the governing characteristic. It is remarkable, too, that the law of England, wherever it touches moral philosophy openly and avowedly, touches it at the point at which it is most deeply implicated with Roman law. It is difficult to read the early Equity Reports without being struck by the influence which a particular school of jurists—the series of writers on the Law of Nature—had on the minds of the judges who first gave form and system to the jurisprudence of the Court of Chancery. Now, in the volumes of this

[1] Austin, *Province of Jurisprudence Determined*, App. pp. 45 *et seq.*

school, not only does moral philosophy retain the phraseology and the modes of reasoning peculiar to Roman law, but the two departments of thought have not as yet been recognised as separable, and as capable of being considered apart from each other. Even now, whenever a proposition of moral philosophy makes its appearance in an argument or in a judicial decision, it generally appears in the dress which was given to it by the first successors of Grotius. This peculiarity may, perhaps, be partially accounted for by the credit into which Story's *Conflict of Laws*—in the main a compendium of extracts from the writers just mentioned—has risen among us as an authority on Private International Law.

We are here brought to the verge of some considerations of a rather different character. In every language there are necessarily a number of words and phrases which are indicative of legal conceptions, and which carry with them a perpetual reference to the nature and the sanctions of law. Without such expressions, a vast variety of propositions in philosophy, in political economy, in theology, and even in strict science, could never be put into words. Now, it is remarkable that the English language derives a very small number of these expressions from English law; and, indeed, few things are more curious, or more illustrative of the peculiar relation in which the law of England has always stood to the other departments

of English thought, than the slightness of the influence which our jurisprudence has exercised on our tongue. The Law of Procedure and some other subordinate departments have contributed, though not largely, to enrich our vernacular dialect; and both in England and in America a considerable number of legal phrases have acquired currency as slang; but the expressions in classical English which are indicative of fundamental legal conceptions, come to us, almost without an exception, from Roman law. They have filtered into the language from a variety of sources, and never having been kept to their original meaning by any controlling system or theory, they have become mere popular expressions, exhibiting all the deficiencies of popular speech—vague, figurative, and inconsistent. Looked at even from an unprofessional point of view, this is a great evil. Unlike other nations, we lose all the advantage of having the most important terms of our philosophical phraseology scrutinized, sifted, and canvassed by the keen intellect of lawyers; and we deprive ourselves of that remarkable, and almost mysterious, precision which is given to words, when they are habitually used in discussions which are to issue directly in acts. It is difficult to say how much of the inferiority of England in philosophical speculation is owing to this laxity of language; and even if the mischiefs which it is calculated to produce were in themselves trifling,

they would become formidable in a country which is governed by free discussion. We can easily trace their effects on minds of rigid accuracy. Bentham was driven by them to invent a new vocabulary of his own, which is still the greatest obstacle to his influence. Mr. Austin can only evade them by a style out of which metaphor has been weeded till it has become positively repulsive. Dr. Whewell has acknowledged them by repeatedly falling back on t strict usage of the Roman jurisconsults. T e however, is not one which is felt solely by the philosophy of jurisprudence. It extends to fessional lawyers. Like all men who speak and t they employ the expressions which have been as inherited by us from Roman law; but they employ them solely as *popular* expressions—as expressions which serve merely to eke out technical phraseology. Even 'Obligation,' the term of highest dignity and importance in all jurisprudence, is not defined in English law, and is used by our lawyers with reckless inconsistency. The consequence is not quite the same as on the unprofessional world. It would be absurd to tax the English Bench and Bar with inaccurate thinking. But the natural resource of an accurate mind, dealing with mere popular language, is prolixity. Words and phrases must be constantly qualified and limited, and every important proposition, to prevent misapprehension, must be put in a great variety

of forms. Hence the extraordinary length of our forensic arguments and legal decisions. Hence that frightful accumulation of case-law which conveys to English jurisprudence a menace of revolution far more serious than any popular murmurs, and which, if it does nothing else, is giving to mere tenacity of memory a disgraceful advantage over all the finer qualities of the legal intellect.

There never, probably, was a technical phraseology which, unaided by popular language, was in itself sufficient for all the uses of lawyers. Where, however, the technical vocabulary is fairly equal to the problems which have to be discussed, the inconveniences just alluded to are reduced to a minimum. Is this the case with English law? It is impossible to answer the question without calling attention to the singular condition of our whole legal language. The technical part of it—whatever may be thought of the system to which it was an appendage—was certainly once quite able to cope with all the points which arose; nor did it drop or relax any of its remarkable precision in solving them. But its serviceableness has long since ceased. The technicalities of English law have lost all their rigidity and accuracy without at the same time becoming equal to the discussion of the questions which press daily on the attention of the Bench and the Bar. We misuse our terms of art without scruple—freely applying, for

example, to Personalty expressions which, having their origin in real property law, are ultimately referrible to feudal conceptions—and yet we have to call in popular phraseology to an extent unknown in any other system. Nothing harsher can be said of a legal vocabulary, than that it consists of technical phraseology in a state of disintegration, and of popular language employed without even an affectation of precision. Yet this reproach is the literal truth as respects the law of England. Many causes may be assigned for it. The eccentric course of our law reforms has, doubtless, contributed to it; and it should not be forgotten that lawyers are apt to strain technical terms to new uses, under a sense of their superiority to language borrowed from ordinary discourse. But the grand cause of all has been the slightness of the care which, owing to the absence of an organized educational system, has been bestowed in England upon Legal and Legislative Expression. The heterogeneousness of the sources from which our tongue has been derived appears to impose on us, more than on any other nation, the duty of nurturing this branch of legal science; and yet there is no nation in the world which has neglected it so signally. The evil consequences of our indifference have at length become patent and flagrant. They make themselves felt on all sides. They are seen in the lengthiness of our Law Reports. They show them-

selves in the miscarriages of our Acts of Parliament. They put us to the blush in the clumsiness of our attempts to grapple with the higher problems of law. It would be impertinent to pretend that any one complete remedy can be pointed out, but it may be affirmed without hesitation that several palliatives are within our reach. Though the decay of the technical element in our legal dialect is probably beyond help, a far greater amount of definiteness, distinctness, and consistency might assuredly be given to the popular ingredient. Legal terminology might be made a distinct department of legal education; and there is no question that, with the help of the Roman law, its improvement might be carried on almost indefinitely. The uses of the Roman jurisprudence to the student of Legislative and Legal Expression are easily indicated. First, it serves him as a great model, not only because a rigorous consistency of usage pervades its whole texture, but because it shows, by the history of the Institutional Treatises, in what way an undergrowth of new technical language may be constantly reared to furnish the means of expression to new legal conceptions, and to supply the place of older technicalities as they fall into desuetude. Next, it is the actual source of what has been here called the popular part of our legal dialect; a host of words and phrases. of which 'Obligation,' 'Convention,' 'Contract,' 'Consent,'

'Possession,' and 'Prescription,' are only a few samples, are employed in it with as much precision as are, or were, 'Estate Tail' and 'Remainder' in English law. Lastly, the Roman jurisprudence throws into a definite and concise form of words a variety of legal conceptions which are necessarily realized by English lawyers, but which at present are expressed differently by different authorities, and always in vague and general language. Nor is it over-presumptuous to assert that laymen would benefit as much as lawyers by the study of this great system. The whole philosophical vocabulary of the country might be improved by it, and most certainly that region of thought which connects Law with other branches of speculative inquiry, would obtain new facilities for progress. Perhaps the greatest of all the advantages which would flow from the cultivation of the Roman jurisprudence would be the acquisition of a phraseology not too rigid for employment upon points of the philosophy of law, nor too lax and elastic for their lucid and accurate discussion.

In the identity of much of our popular legal phraseology with the technical dialect of Roman law we have one chief source of the intellectual mist which interposes itself between an Englishman and a large part of Continental philosophy. We have also the chief reason why it is so difficult to convince an Englishman that any such impediment exists. Deal-

ing, for the most part, with language to which he is accustomed, he can scarcely be persuaded that he gains at most that sort of half knowledge which, as every lawyer knows, an intelligent layman will acquire from the perusal of a legal treatise on a branch of law in which the technical usage of words does not widely differ from the vernacular. There is, however, one subject of thought common to ourselves and the Continent, on which scarcely one man among us has probably consulted foreign writers of repute without feeling that he is in most imperfect contact with his authorities. It is the secret belief of many of the most accurate minds in England that International Law, Public and Private, is a science of declamation ; and, when phraseology intended by the writer to be taken strictly is understood by the reader loosely, the impression is not at all unnatural. We cannot possibly overstate the value of Roman Jurisprudence as a key to International Law, and particularly to its most important department. Knowledge of the system and knowledge of the history of the system are equally essential to the comprehension of the Public Law of Nations. It is true that inadequate views of the relation in which Roman law stands to the International scheme are not confined to Englishmen. Many contemporary publicists, writing in languages other than ours, have neglected to place themselves at the point of view from which the

originators of Public Law regarded it; and to his omission we must attribute much of the arbitrary assertion and of the fallacious reasoning with which the modern literature of the Law of Nations is unfortunately rife. If International Law be not studied historically—if we fail to comprehend, first, the influence of certain theories of the Roman jurisconsults on the mind of Hugo Grotius, and, next, the influence of the great book of Grotius on International Jurisprudence,—we lose at once all chance of comprehending that body of rules which alone protects the European commonwealth from permanent anarchy, we blind ourselves to the principles by conforming to which it coheres, we can understand neither its strength nor its weakness, nor can we separate those arrangements which can safely be modified from those which cannot be touched without shaking the whole fabric to pieces. The authors of recent international treatises have brought into such slight prominence the true principles of their subject, or for those principles have substituted assumptions so untenable, as to render it matter of no surprise that a particular school of politicians should stigmatize International Law as a haphazard collection of arbitrary rules, resting on a fanciful basis and fortified by a wordy rhetoric. Englishmen, however,—and the critics alluded to are mostly Englishmen,—will always be more signally at fault than the rest of the world in

attempting to gain a clear view of the Law of Nations. They are met at every point by a vein of thought and illustration which their education renders strange to them; many of the technicalities delude them by consonance with familiar expressions, while to the meaning of others they have two most insufficient guides in the Latin etymology and the usage of the equivalent term in the non-legal literature of Rome. Little more than a year has elapsed since the Lower House of the English Parliament occupied several hours with a discussion as to the import of one of the commonest terms [1] inherited by modern jurisprudence from Roman law. Nor are these remarks answered by urging that comparative ignorance of International Law is of little consequence so long as the parties to International discussions completely understand each other; or, as it might be put, that Roman law may be important to the closet-study of the Law of Nations, but is unessential as regards diplomacy. There cannot be a doubt that our success in negotiation is sometimes perceptibly affected by our neglect of Roman law; for, from this cause, we and the public, or negotiators, of other countries constantly misunderstand each other. It is not rarely that we refuse respect or attention to diplomatic communications, as wide of the point and full of verbiage or conceits, when, in fact,

[1] *Solidairement.* Hansard's *Parliamentary Debates*, July 27th, 1855.

they owe those imaginary imperfections simply to the juristical point of view from which they have been conceived and written. And, on the other hand, state-papers of English origin, which to an Englishman's mind ought, from their strong sense and directness, to carry all before them, will often make but an inconsiderable impression on the recipient from their not falling in with the course of thought which he insensibly pursues when dealing with a question of public law. In truth, the technicalities of Roman law are as really, though not so visibly, mixed up with questions of diplomacy as are the technicalities of special pleading with points of the English Common law. So long as they cannot be disentangled, English influence suffers obvious disadvantage through the imperfect communion of thought. It is undesirable that there should not be among the English public a sensible fraction which can completely decipher the documents of International transactions, but it is more than undesirable that the incapacity should extend to our statesmen and diplomatists. Whether Roman law be useful or not to English lawyers, it is a downright absurdity that, on the theatre of International affairs, England should appear by delegates unequipped with the species of knowledge which furnishes the medium of intellectual communication to the other performers on the scene.

The practitioner of English law who would care

little for the recommendations of this study which have as yet been mentioned, must nevertheless feel that he has an interest in Roman jurisprudence in respect of the relation in which it stands to all, or nearly all, foreign law. It may be confidently asserted, that if the English lawyer only attached himself to the study of Roman law long enough to master the technical phraseology and to realize the leading legal conceptions of the *Corpus Juris*, he would approach those questions of foreign law to which our Courts have repeatedly to address themselves with an advantage which no mere professional acumen acquired by the exclusive practice of our own jurisprudence could ever confer on him. The steady multiplication of legal systems, borrowing the entire phraseology, adopting the principles, and appropriating the greater part of the rules of Roman jurisprudence, is one of the most singular phenomena of our day, and far more worthy of attention than the most showy manifestations of social progress. This gradual approach of Continental Europe to a uniformity of municipal law dates unquestionably from the first French Revolution. Although Europe, as is well known, formerly comprised a number of countries and provinces which governed themselves by the written Roman law, interpolated with feudal observances, there does not seem to be any evidence that the institutions of these localities enjoyed any vogue or favour beyond

their boundaries. Indeed, in the earlier part of the last century there may be traced among the educated men of the Continent something of a feeling in favour of English law—a feeling proceeding, it is to be feared, rather from the general enthusiasm for English political institutions which was then prevalent, than founded on any very accurate acquaintance with the rules of our jurisprudence. Certainly, as respects France in particular, there were no visible symptoms of any general preference for the institutions of the *pays de droit écrit* as opposed to the provinces in which customary law was observed. But then came the French Revolution, and brought with it the necessity of preparing a general code for France one and indivisible. Little is known of the special training through which the true authors of this work had passed; but in the form which it ultimately assumed, when published as the Code Napoleon, it may be described, without great inaccuracy, as a compendium of the rules of Roman law [1]

[1] It is not intended to imply that the framers of the Code Civil simply adopted the Civil law of the *pays de droit écrit*, and rejected that of the *pays de droit coutumier*. Many texts of the French Codes which seem to be literally transcribed from the *Corpus Juris* come from the *droit coutumier*, into which a large element of Roman law had gradually worked its way. Those parts of the Code Civil in which the Customs have been followed in points in which they differed from the Roman law are chiefly the chapters which have reference to Personal Relations; but in this department there had been, as might be expected, considerable deviations from Roman jurisprudence even in the *pays de droit écrit*.

then practised in France, cleared of all feudal admixture—such rules, however, being in all cases taken with the extensions given to them, and the interpretations put upon them by one or two eminent French jurists, and particularly by Pothier. The French conquests planted this body of laws over the whole extent of the French Empire, and the kingdoms immediately dependent on it; and it is incontestable that it took root with extraordinary quickness and tenacity. The highest tribute to the French Codes is their great and lasting popularity with the people, the lay-public, of the countries into which they have been introduced. How much weight ought to be attached to this symptom our own experience should teach us, which surely shows us how thoroughly indifferent in general is the mass of the public to the particular rules of civil life by which it may be governed, and how extremely superficial are even the most energetic movements in favour of the amendment of the law. At the fall of the Bonapartist Empire in 1815, most of the restored Governments had the strongest desire to expel the intrusive jurisprudence which had substituted itself for the ancient customs of the land. It was found, however, that the people prized it as the most precious of possessions: the attempt to subvert it was persevered in in very few instances, and in most of them the French Codes were restored after a brief

abeyance. And not only has the observance of these laws been confirmed in almost all the countries which ever enjoyed them, but they have made their way into numerous other communities, and occasionally in the teeth of the most formidable political obstacles. So steady, indeed, and so resistless has been the diffusion of this Romanized jurisprudence, either in its original or in a slightly modified form, that the civil law of the whole Continent is clearly destined to be absorbed and lost in it. It is, too, we should add, a very vulgar error to suppose that the civil part of the Codes has only been found suited to a society so peculiarly constituted as that of France. With alterations and additions, mostly directed to the enlargement of the testamentary power on one side, and to the conservation of entails and primogeniture on the other, they have been admitted into countries whose social condition is as unlike that of France as is possible to conceive. A written jurisprudence, identical through five-sixths of its tenor, regulates at the present moment a community monarchical, and in some parts deeply feudalized, like Austria,[1] and a community dependent for its existence on commerce, like Holland—a society so near

[1] The Code of Austria was commenced under Joseph II., but not completed till 1810. The portions of it which were framed after the appearance of the French Codes follow them in everything except some minor peculiarities of expression.

the pinnacle of civilization as France, and one as primitive and as little cultivated as that of Sicily and Southern Italy.

Undeniable and most remarkable as is this fact of the diffusion within half a century over nearly all Europe of a jurisprudence founded on the Civil Law of Rome, there are some minds, no doubt, to which it will lose much of its significance when they bethink themselves that in the ground thus gradually occupied, the French Codes have not had to compete directly with the Law of England. We can readily anticipate the observation, that against these conquests of a Romanized jurisprudence in Europe may be set off the appropriation of quite as large a field by the principles of our own system in America. There, it may be said, the English uncodified jurisprudence, with its conflict of Law and Equity, and every other characteristic anomaly, is steadily gathering within its influence populations already counted by millions, and already distinguished by as high a social activity as the most progressive communities of Continental Europe. It is not the object of this Essay to disparage the English law, and still less its suitableness to Anglo-Saxon societies; but it is only honest to say that the comparison just suggested does not quite give at present the results expected from it. During many years after the severance of the United States from the mother-

country, the new States successively formed out of the unoccupied territory of the Federation did all of them assume as the standard of decision for the Courts in cases not provided for by legislation, either the Common law of England, or the Common law as transformed by early New England statutes into something closely resembling the Custom of London. But this adherence to a single model ceased about 1825. The State of Louisiana, for a considerable period after it had passed under the dominion of the United States, observed a set of civil rules strangely compounded of English case-law, French code-law, and Spanish usages. The consolidation of this mass of incongruous jurisprudence was determined upon, and after more than one unsuccessful experiment, it was confided to the first legal genius of modern times—Mr. Livingston. Almost unassisted,[1] he produced the Code of Louisiana, of all republications of Roman law the one which appears to us the clearest, the fullest, the most philosophical, and the best adapted to the exigencies of modern society. Now it is this code, and not the Common law of England, which the newest American States are taking for the substratum of their laws. The diffusion of the Code of Louisiana does, in fact,

[1] Mr. Livingston, as is well known, was the sole author of the Criminal Code. In the composition of the Civil Code, he was associated with MM. Derbigny and Morolialet; but the most important chapters, including all those on Contract, are entirely from his pen.

exactly keep step with the extension of the territory of the Federation. And, moreover, it is producing sensible effects on the older American States. But for its success and popularity, we should not probably have had the advantage of watching the greatest experiment which has ever been tried on English jurisprudence—the still-proceeding codification and consolidation of the entire law of New York.

The Roman law is, therefore, fast becoming the *lingua franca* of universal jurisprudence; and even now its study, imperfectly as the present state of English feeling will permit it to be prosecuted, may nevertheless be fairly expected to familiarize the English lawyer with the technicalities which pervade, and the jural conceptions which underlie, the legal systems of nearly all Europe and of a great part of America. If these propositions are true, it seems scarcely necessary to carry further the advocacy of the improvements in legal education which are here contended for. The idle labour which the most dexterous practitioner is compelled to bestow on the simplest questions of foreign law is the measure of the usefulness of the knowledge which would be conferred by an Institutional course of Roman jurisprudence.

In the minds of many Englishmen, there is a decided, though vague, association between the study

of Roman law and the vehemently controverted topic of Codification. The fact that the two subjects are thus associated, renders it desirable that we should endeavour to show what, in our view, is their real bearing upon each other; but, before the attempt is made, it is worth while remarking that this term 'Codification,' modern as it is, has already undergone that degradation of meaning which seems in ambush for all English words that lie on the border-land between legal and popular phraseology, and has contracted an important ambiguity. Both those who affirm and those who deny the expediency of codifying the English law, visibly speak of Codification in two different senses. In the first place, they employ the word as synonymous with the conversion of Unwritten into Written Law. The difference between this meaning and another which will be noticed presently, may best be illustrated by pointing to the two Codes of Rome—the one which began and the one which terminated her jurisprudence—the Twelve Tables and the *Corpus Juris* of Justinian. At the dawn of legal history, the knowledge of the Customs or Observances of each community was universally lodged with a privileged order; with an Aristocracy, a Caste, or a Sacerdotal Corporation. So long as the law was confined to their breasts, it was true Unwritten Law; and it became written Law when the juristical oligarchy was compelled to part

with its exclusive information, and when the rules of civil life, put into written characters and exposed to public view, became accessible to the entire society. The Twelve Tables, the Laws of Draco, and to some extent of Solon, and the earliest Hindoo Code, were therefore products of Codification in this first sense of the word. There is no doubt, too, that the English Judges and the Parliaments of the *Pays Coutumiers* in France long claimed, and were long considered, to be depositaries of a body of law which was not entirely revealed to the lay-public. But this theory, whether it had or had not a foundation in fact, gradually crumbled away, and at length we find it clearly, though not always willingly, acknowledged that the Legislature has the exclusive privilege of declaring to be law that which is not written as law in previous positive enactments, or in books and records of authority. Thenceforward, the old ideas on the subject of the judicial office were replaced by the assumption, on which the whole administration of justice in England is still founded, that *all* the law is declared, but that the Judges have alone the power of indicating with absolute certainty in what part of it particular rules are to be found. For at least two centuries before the Revolution, the French *Droit Coutumier*, though still conventionally opposed to the *Droit Écrit*, or Roman Law, had itself become *written* law; nobody pretended to look for it elsewhere than

in Royal Ordinances, or in the *Livres de Coutumes*, or in the tomes of the Feudists. So, again, it is not denied by anybody in England, and certainly not by the English Judges, that every possible proposition of English jurisprudence may be found, in some form or other, in some chapter of the *Statutes at Large*, or in some page of one of the eight hundred volumes of our Law Reports. English Law is therefore Written Law; and it is also Codified Law, if the conversion of unwritten into written law is Codification. Codification is, however, plainly used in another sense, flowing from the association of the word with the great experiment of Justinian. When Justinian ascended the throne, the Roman law had been written for centuries, and the undertaking of the Emperor and his advisers was to give orderly arrangement to this written law—to deliver it from obscurity, uncertainty, and inconsistency—to clear it of irrelevancies and unnecessary repetitions—to reduce its bulk, to popularize its study, and to facilitate its application. The attempt, successful or not, gives a second meaning to Codification. The word signifies the conversion of Written into *well* Written law; and in this sense English jurisprudence is certainly not Codified, for, whatever be its intrinsic merits, it is loosely and lengthily written, and its *Corpus Juris* is a Law Library. Yet surely Codification, taken in this second acceptation, indicates one of the highest and

worthiest objects of human endeavour. It is always difficult to know what requires to be proved in England; but it appears tolerably obvious, that if law be written at all it is desirable that it should be clearly, tersely, and accurately written. The true question is, not whether Codification be itself a good thing, but whether there is power enough in the country to overcome the difficulties which impede its accomplishment. Can any body of men be collected which shall join accurate knowledge of the existing law to a complete command of legislative expression and an intimate familiarity with the principles of legal classification? If not, the argument for a Codification of English law is greatly weakened. Few will deny that badly-expressed law, thoroughly understood and dexterously manipulated, is better than badly-expressed law of which the knowledge is still to seek. And, indeed, when it does not seem yet conceded that we can produce a good statute, it appears premature to ask for a Code.

It cannot be pretended that knowledge of the Roman law would by itself enable Englishmen to cope with the difficulties of Codification. Yet it is certain that the study of Roman law, as ancillary to the systematic cultivation of legal and legislative expression, would arm the lawyer with new capacities for the task; and we may almost assert, having regard to the small success of Bentham's experiments

on English legal phraseology, that Codification will never become practicable in England without some help from that wonderful terminology which is, as it were, the Short-hand of jurisprudence. Still larger would be the sphere of Roman law if all obstacles were overcome, and a Code of English law were actually prepared. It is not uncommonly urged by the antagonists of Codification, that Codified law has some inherent tendency to produce glosses, or, as they sometimes put it, that Codes always become *overlaid* with commentaries and interpretative cases. If the learned persons who entertain this opinion, instead of arguing from the half-understood statistics of foreign systems, would look to their own experience, they would see that their position is either trivial or paradoxical. If by Codified law they merely mean *written* law, they need not go far from home to establish their point; for the English law, which is as much written law as the Code of Louisiana, throws off in each year about fifteen hundred authoritative judgments, and about fifty volumes of unauthoritative commentary. On the other hand, if Codified law is used by these critics to signify law as clearly and harmoniously expressed as human skill can make it, their assertion draws with it the monstrous consequence that a well-drawn Statute produces more glosses than one which is ill drawn, so that the Act for the Abolition of Fines and Recoveries ought to have produced more

cases than the Thellusson Act. The truth which lies at the bottom of these cavils is probably this—that no attainable skill applied to a Code can wholly prevent the extension of law by judicial interpretation. Bentham thought otherwise, and it is well known that in several Codes the appeal to mere adjudicated cases is expressly interdicted. But the process by which the application of legal rules to actual occurrences enlarges and modifies the system to which they belong, is so subtle and so insensible, that it proceeds even against the will of the interpreters of the law; and, indeed, the assumption made directly or indirectly in every Code, that the principles which it supplies are equal to the solution of every possible question, appears to carry necessarily with it some power of creating what Bentham would have called judge-made law. There are means, however, by which this judicial legislation may be reduced to a minimum. A Code, like a Statute, narrows the office of the judicial expositor in proportion to the skill shown in penning it. Some use, though very sparing[1] use, is made of cases in the interpretation of French law; but the Code of Louisiana, which was framed by persons who had many advantages over the authors of the Code Napoleon, is said to have been very little modified by cases, though the practitioners of an American State have, as might be

[1] The exact extent to which cases are employed will be easily seen on opening the Commentary of M. Troplong.

expected, no prejudice against them. Yet the surest preservative of all against over-reliance on adjudged precedents, and the best mitigation of imperfections in a Code of English Law, would be something of the peculiar tact which is extraordinarily developed in the Roman jurisconsults. We have already spoken of the instruction given by the Civil law in the interpretation and manipulation of express written rules. It may even be affirmed that the study of Roman jurisprudence is itself an education in those particular exercises.

Apart, however, from these litigated questions, attention may be called to the tacit Codification (the word being always taken in its second sense) which is constantly proceeding in our law. Every time the result of a number of cases is expressed in a formula, and that formula becomes so stamped with authority—whether the authority of individual learning or of long-continued usage—that the Courts grow disinclined to allow its terms to be revised on a mere appeal to the precedents upon which it originally rested, then, under such circumstances, there is, *pro tanto*, a Codification. Many hundred, indeed many thousand, dicta of Judges—not a few propositions elicited by writers of approved treatises, such as the well-known books on *Vendors and Purchasers* and on *Powers*—are only distinguishable in name from the texts of a Code ; and, much as the current

language of the legal profession may conceal it, an acute observer may discover that the process of, as it were, stereotyping certain legal rules is at this moment proceeding with unusual rapidity, and is, indeed, one of the chief agencies which save us from being altogether overwhelmed by the enormous growth of our case-law. In the manipulation of texts thus arrived at, there is room for those instrumentalities which the Roman law has been described as supplying—although doubtless the chance, which is never quite wanting, of the rule being modified or changed on a review of the precedents, is likely to prevent the free use of canons of interpretation which assume the fixity of the proposition to be interpreted. No such risk of modification impends, however, over the Statute-law; and surely the state of this department of our jurisprudence, coupled with the facts of its vastness and its ever-increasing importance, make the reform of our legal education a matter of the most pressing and immediate urgency. It is now almost a commonplace among us, that English lawyers, though matchless in their familiar field of case-law, are quite unequal to grapple with express enactments; but the profession speaks of the imperfection with levity and without shame, because the fault is supposed to lie with the Legislature. Unquestionably our legislation does occasionally fall short of the highest standard in respect of lucidity, terseness, and orderly

arrangement; but even though the admission be true in all its tenor, it appears merely to shift the reproach a single step, for nobody doubts that our statutes are framed by lawyers, and are, in the long run, the fruit of whatever capacity for orderly disposition and whatever power of comprehensive expression are to be found among the Bar. The Statute-book is no credit to the Legislature; but it is, at the same time, the *opprobrium jurisperitorum*. Not, indeed, that its condition is attributable to individual framers of statutes, who frequently work marvels, considering the circumstances in which they are placed. It may, with much greater justice, be explained by the special mental habits of the English Bar in general; and it is, in fact, one of the many consequences of forgetting the great truth, that to secure the consistency and cohesion of a body of law, a uniform system of legal education is as necessary as a common understanding among the Judges, or a free interchange of precedents among the Courts.

Before, however, we try to establish the proposition just hazarded, it may be as well to notice the argument which attributes all the imperfections of the Statute-law to the procedure of Parliament. It is urged that insufficient care is bestowed on the selection of draftsmen, so that the results of the highest skill and labour are discredited by juxtaposition with the work of inferior hands. The grand source of

mischief is, however, affirmed to be the practice of introducing Amendments into Bills during their passage through the Houses; so that the unity of language and conception which pervaded the original production is completely broken through, and the measure is interpolated with clauses penned in ignorance of the particular technical objects which the first draftsman had in view. For remedy of this palpable evil, many schemes have been proposed; and a good authority has suggested the creation of a board of official draftsmen, which should revise the draft of every proposed measure before it is submitted to Parliament, and to which every Bill, with its amendments, should, at some stage of the subsequent proceedings, be referred, in order that the changes accepted by the House should be harmonized with the general texture of the enactment. The advantages of such an institution, for all technical purposes, are not to be questioned; but the plan seems one little likely to be adopted, as being signally at conflict with the current sentiments of Englishmen. It interferes in appearance with the liberty of Parliament, and there is no doubt that, in reality, it is a much more formidable institution than its projectors imagine. In order that its objects should be completely realized, it would be probably necessary to arm this board with all the powers which, even under the French Constitution of 1848, were confided to the

Council of State; and the admission must in honesty be made, that the Council of State has always practically fettered the activity of French legislatures, and has uniformly gained in dignity and power at the expense of constitutional freedom. Far be it from us to deny that by a carefully-elaborated mechanism all these risks might be avoided; but an improvement likely at best to be opposed by such strong prepossessions, might well be postponed, if a simpler remedy can be discovered.

The truth is, that both the difficulty of drafting Statutes and the confusion caused by amending them are infinitely greater than they need be, and infinitely greater than they would be if English practitioners were subjected to any system of legal education in which proper attention was paid to the dialect of legislation and law. This branch of study may be described, though the comparison cannot from the nature of the case be taken strictly, as having for its object to bring all language, for legal purposes, to the condition of algebraic symbols, and therefore to produce uniformity of method in its employment, and identity of inference in its interpretation. In practice, of course, nothing more than an approximation to these results could be obtained; but it is likely that a general educational machinery, even though comparatively inefficient, would add materially to the extent and importance of that portion of legis-

lative phraseology which is common stock. As matters stand, each draftsman of statutes is absolutely separated from his colleagues. Each works on his own basis, in some cases with consummate skill and knowledge, in occasional instances with very little either of the one or the other. Each forms his own legislative dialect, and even frames the dictionary by which the public and the Courts are to interpret it. The greatest possible varieties of style, visible even to a layman, do, in fact, show themselves in the later volumes of the Statute-book; and in the drafting of some of the most important Statutes passed quite recently, it is plain that two distinct models have been followed, one of them involving the use of extremely technical, the other of excessively popular language. The effect of Amendments on Bills which are drawn under such circumstances is quite disastrous; and if the confusion which they create is not immediately detected by a non-legal eye, it is only from inadequate appreciation of the value which at once attaches to the separate words and phrases of legislative enactments when subjected to judicial scrutiny. The interpolations are not merely like touches by an inferior artist in the painting of a master. They are not simply blemishes which offend taste, and which require a connoisseur to discover them. They are far more like a new language, a new character, and a new vein of thought, suddenly occurring in a document or

inscription, which has to be deciphered exclusively by the means of information which it furnishes itself to the interpreter.

The mischiefs arising from the Amendment of Bills are much aggravated by the peculiar canons of interpretation which the insulation of draftsmen forces upon our tribunals. The English law was always distinguished from other systems, and particularly from the Roman law, by the scantiness of its apparatus of rules for construing Statute-law as a whole. In proportion, however, to the growing variety of style and arrangement in Acts of Parliament, the availableness of the existing rules has progressively diminished, and timidity in applying them has insensibly increased, until at length Bench, Bar, and Commentators have pretty well acquiesced in the practice of looking exclusively to the particular Statute which may be under consideration for the means of interpreting it—of refusing, as it is sometimes phrased, to travel out of the four corners of the Act. Of all the anomalies which disfigure or adorn the Law of England, this is not the one which would least astonish the foreign jurist. English lawyers, however, have lost all sense of its unnaturalness, and it really seems inevitable, so long as the different chapters of the Statute-book are connected by no relation except of subject. Unfortunately, it reacts upon the draftsman, and adds very materially to his difficulties and

responsibilities. It forces him not only to set out all the bearings of the legal innovation which he means to introduce, but to disclose the very elements of the legislative dialect in which he intends to declare them. It imposes on him a verbose prolixity which seriously increases his liability to misconstruction, and involves him in a labyrinthine complexity of detail which renders his work peculiarly susceptible of injury by amendments and alterations. The vastness of their contents has been repeatedly pointed out as the characteristic vice of English Statutes. No doubt, this is partially caused by the marked tendency of our legislation to deal not so much with principles as with applications of principles, the authors of enactments endeavouring to anticipate all the possible results of a fundamental rule, with the view of limiting or enlarging them, but scarcely ever risking the attempt to modify and shape anew the fundamental rule itself. But the great cause is certainly that which has been indicated, in the want of a common fund of technical legislative expression, and in the methods of judicial construction which are entailed upon us by this *lacuna* in our law. Every English Act of Parliament is, in fact, forced to carry on its back an enormous mass of matter which, under a better system, would be produced as it is wanted from the permanent storehouse of jurisprudence; and it is to this necessity that the frequent miscarriages of our Statute-law

ought to be attributed, quite as much as to defects in the mechanism of legislation.

There are many persons who will be sufficiently attracted to the study of Roman Law by the promise which it holds out of helping to enrich our language with a new store of Legal and Legislative Expression; of contributing to clear up the obscurity which surrounds the fundamental conceptions of all jurisprudence; of throwing light, by the illustrative parallels which it affords, on many of the principles peculiar to English law; and lastly, of enabling us, by the observation of its own progress, to learn something of the course of development which every body of legal rules is destined to follow. To such minds many of the remarks offered in this Essay have been less addressed than to those who are likely to be affected by the common aspersion on these studies, that they are not of any practical value. It is to be hoped that future generations will not judge the present by its employment of the word 'practical.' This solitary term, as has been truly enough remarked, serves a large number of persons as a substitute for all patient and steady thought; and, at all events, instead of meaning that which is useful, as opposed to that which is useless, it constantly signifies that of which the use is grossly and immediately palpable, as distinguished from that of which the usefulness can only be discerned after attention and

exertion, and must at first be chiefly believed, on the faith of authority. Now, certainly, if by mastering the elements of Roman Law we gain the key to International Law, public and private, and to the Civil Law of nearly all Europe, and of a large part of America—if, further, we are put in a fair way to acquire a dexterity in interpreting express rules which no other exercise can confer—the uses of this study must be allowed not to lie very remote from the pursuits of even the most servile practitioner; but still the vulgar notions concerning practical usefulness make it necessary to give the warning that the aids furnished by Roman law are not, for the most part, instantly available. It is not difficult to perceive that the comparative credit into which Roman jurisprudence is rising is constantly tempting persons to appeal to its resources who are not properly prepared to employ them. Except where the English lawyer is gifted with extraordinary tact, it is exceedingly dangerous for him to open the *Corpus Juris*, and endeavour, by the aid of the knowledge of Latinity common in this country, to pick out a case on all-fours with his own, or a rule germane to the point before him. The Roman law is a system of rules rigorously adjusted to principles, and of cases illustrating those rules; and unless the practitioner can guide himself by the clue of principle, he will almost infallibly imagine parallels where they have no existence, and as

certainly miss them when they are there. No one, in short, should read his Digest without having mastered his Institutes. When, however, the fundamental conceptions of Roman law are thoroughly realized, the rest is mastered with surprising facility—with an ease, indeed, which makes the study, to one habituated to the enormous difficulty of English law, little more than child's play.

Whatever be the common impressions on the point, there are singular facilities in England for the cultivation of Roman law. We already prosecute with as much energy as any community in the world the studies which lead up to this one, and the studies to which this one ought to be introductory. Between classical literature and English law, the place is made for the Roman jurisprudence. It would effectually bridge over that strange intellectual gulf which separates the habits of thought which are laboriously created at our Schools and Universities from the habits of thought which are necessarily produced by preparation for the Bar—a chasm which, say what we will, costs the legal profession some of the finest faculties of the minds which do surmount it, and the whole strength of the perhaps not inferior intellects which never succeed in getting across. In England, too, we should have the immense advantage of studying the pure classical Roman law, apart from the load of adventitious

speculation with which it has got entangled during its contact with the successive stages of modern thought. Neither custom nor opinion would oblige us, as they oblige the jurists of many other countries, to embarrass ourselves with the solution of questions engrafted on the true Roman jurisprudence by the scholasticism of its first modern doctors, by the philosophical theories of its next expositors, and by the pedantry of its latest interpreters. Apart from these gratuitous additions, it is not a difficult study, and the way is cleared for it. Nothing would seem to remain except to demonstrate its value; and here, no doubt, is the difficulty. The unrivalled excellence of the Roman law is often dogmatically asserted, and, for that very reason perhaps, is often superciliously disbelieved; but, in point of fact, there are very few phenomena which are capable of so much elucidation, if not explanation. The proficiency of a given community in jurisprudence depends, in the long run, on the same conditions as its progress in any other line of inquiry; and the chief of these are the proportion of national intellect devoted to it, and the length of time during which it is so devoted. Now, a combination of all the causes, direct and indirect, which contribute to the advancing and perfecting of a science, continued to operate on the jurisprudence of Rome through the entire space between the Twelve Tables and the reform of Justinian,—and that not irregularly or at

should be remarked, that, besides its efflorescence in ornamental literature, it was on the eve of throwing out new aptitudes for conquest in physical science. Here, however, is the point at which the history of mind in the Roman State ceases to be parallel to the routes which mental progress has since then pursued. The brief span of Roman literature, strictly so called, was suddenly closed under a variety of influences, which, though they may partially be traced, it would be improper in this place to analyse. Ancient intellect was forcibly thrust back into its old courses, and law again became no less exclusively the proper sphere for talent than it had been in the days when the Romans despised philosophy and poetry as the toys of a childish race. Of what nature were the external inducements which, during the Imperial period, tended to draw a man of inherent capacity to the pursuits of the jurisconsult, may best be understood by considering the option which was practically before him in his choice of a profession. He might become a teacher of rhetoric, a commander of frontier-posts, or a professional writer of panegyrics. The only other walk of active life which was open to him was the practice of the law. Through *that* lay the approach to wealth, to fame, to office, to the council-chamber of the monarch—it may be to the very throne itself.

The stoppage of literary production at Rome is sometimes spoken of as if it argued a decay of Roman

intellect, and therfore a decline in the mental energies of the civilized world. But there seems to be no ground for such an assumption. Many reasons may be assigned for the phenomenon in question; but none of them can be said to imply any degeneration of those faculties which, but for intervening impediments, might have been absorbed by art, science, or literature. All modern knowledge and all modern invention are founded on some disjointed fragments of Greek philosophy, but the Romans of the Empire had the whole edifice of that philosophy at their disposal. The triumphs of modern intellect have been accomplished in spite of the barriers of separate nationalities; but the Roman Empire soon became homogeneous, and Rome, the centre towards which the flower of the provincial youth drew together, became the depository of all the available talent in the world. On these considerations, it would seem that progress of some kind or other, at least equal to our own, might have been expected *à priori*; and indeed, whatever we may think of *results*, it seems both presumptuous and contrary to analogy, to affirm that *capacities* were smaller in the reign of the Antonines than in the reign of James the First. And if this be so, we know the labour on which these capacities exhausted themselves. The English law has always enjoyed even more than its fair share of the disposable ability of the country; but what would it have been if, besides Coke, Somers, Hardwicke, and Mansfield,

it had counted Locke, Newton, and the whole strength of Bacon—nay, even Milton and Dryden—among its chief luminaries? It would be idle, of course, to affect to find the exact counterparts of these great names among the masters of Roman jurisprudence; but those who have penetrated deepest into the spirit of the Ulpians, Papinians, and Pauluses are ready to assert that in the productions of the Roman lawyers they discover all the grand qualities which we identify with one or another in the list of distinguished Englishmen. They see the same force and elegance of expression, the same rectitude of moral view, the same immunity from prejudice, the same sound and masculine sense, the same sensibility to analogies, the same keen observation, the same nice analysis of generals, the same vast sweep of comprehension over particulars. If this be delusion, it can only be exposed by going step by step over the ground which these writers have traversed. All the antecedent probabilities are in favour of their assertion, however audacious it may appear. Unless we are prepared to believe that for five or six centuries the world's collective intellect was smitten with a paralysis which never visited it before or since, we are driven to admit that the Roman jurisprudence may be all which its least cautious encomiasts have ventured to pronounce it, and that the language of conventional panegyric may even fall short of the unvarnished truth.

APPENDICES.

APPENDIX I.[1]

MINUTE RECORDED ON OCTOBER 1, 1868.

THE first conclusion which I draw (from a Paper 'showing in each case the authority at whose suggestion the Acts of the Governor-General in Council, from No. I. of 1865, to No. XXXVIII. of 1867, were passed') is, that next to no legislation originates with the Supreme Government of India. The only exceptions to complete inaction in this respect which are worth mentioning, occur in the case of Taxing Acts—though, as there is often much communication with the Provincial Governments on the subject of these Acts, the exception is only partial—and in that of a few Acts adapting portions of English Statute-law to India. Former Indian Legislatures introduced into India certain modern English Statutes, limiting their operation to 'cases governed by English law.' The most recent English amendments of the Statutes were, however, not followed in this country until they were embodied in Indian Acts by my predecessor, Mr. Ritchie, and myself, in accordance with the general wish of the Bench and Bar of the High Courts. Examples of this sort of legislation are Acts XXVII. and XXVIII. of 1866, which only apply to 'cases governed by English law.'

The second and much the most important inference which the Paper appears to me to suggest is, that the great bulk of the legislation of the Supreme Council is

[1] Vide p. 70.

attributable to its being the Local Legislature of many Indian Provinces. At the present moment, the Council of the Governor-General for making Laws and Regulations is the sole Local Legislature for the North-Western Provinces, for the Punjab, for Oudh, for the Central Provinces, for British Burmah, for the petty Province of Coorg, and for many small patches of territory which are scattered among the Native States. Moreover, it necessarily divides the legislation of Bengal Proper, Madras, and Bombay with the local Councils of those Provinces. For, under the provisions of the High Court's Act of 1861, it is only the Supreme Legislature which can alter or abridge the jurisdiction of the High Courts, and as this jurisdiction is very wide and far-reaching, the effect is to throw on the Governor-General's Council no small amount of legislation which would naturally fall on the Local Legislatures. Occasionally, too, the convenience of having but one law for two Provinces, of which one has a Council and the other has none, induces the Supreme Government to legislate for both, generally at the request of both their Governments.

Now these Provinces for which the Supreme Council is the joint or sole Legislature exhibit very wide diversities. Some of these differences are owing to distinctions of race, others to differences of land-law, others to the unequal spread of education. Not only are the original diversities between the various populations of India believed nowadays to be much greater than they were once thought to be, but it may be questioned whether, for the present at all events, they are not rather increasing than diminishing under the influence of British Government. That influence has no doubt thrown all India more or less into a state of ferment and progress, but the rate of progress is very unequal and irregular. It is growing more and more difficult to bring the population of two or more Pro-

vinces under any one law which goes closely home to their daily life and habits.

Not only, then, are we the Local Legislature of a great many Provinces, in the sense of being the only authority which can legislate for them on all or certain subjects, but the condition of India is more and more forcing us to act as if we were a Local Legislature, of which the powers do not extend beyond the Province for which we are legislating. The real proof, therefore, of our over-legislation would consist, not in showing that we pass between thirty and forty Acts in every year, but in demonstrating that we apply too many new laws to each or to some one of the Provinces subject to us. Now, I will take the most important of the territories for which we are exclusively the Legislature—the North-Western Provinces; and I will take the year in which, judging from the Paper, there has been most North-Western legislation—the year 1867. The amount does not seem to have been very great or serious. I find that in 1867, if Taxing Acts be excluded, the North-West was affected in common with all or other parts of India by an Act repressive of Public Gambling (No. III.); by an Act for the Registration of Printing Presses (No. XXV.); and by five Acts (IV., VII., VIII., X., and XXXIII.) having the most insignificant technical objects. I find that it was exclusively affected by an Act (I.) empowering its Government to levy certain tolls on the Ganges; by an Act (XXII.) for the Regulation of Native Inns; by an Act (XVIII.) giving a legal constitution to the Courts already established in a single district, and by an Act (XXVIII.) confirming the sentences of certain petty Criminal Courts already existing. I find further that, in the same year, 1867, the English Parliament passed 85 Public General Acts applicable to England and Wales, of which one was the Representation of the People Act. The number of Local and Personal Acts passed in the same year was 188. All this legislation,

too, came, it must be remembered, on the back of a vast mass of Statute-law, compared with which all the written law of all India is the merest trifle. Now the population of England and Wales is rather over 20 millions, that of the North-Western Provinces is supposed to be above 30 millions. No trustworthy comparison can be instituted between the two countries; but, regard being had to their condition thirty years ago, it may be doubted whether, in respect of opinions, ideas, habits, and wants, there has not been more change during thirty years in the North-West than in England and Wales.

A third inference which the Paper suggests is, that our legislation scarcely ever interferes, even in the minutest degree, with Private Rights, whether derived from usage or from express law. It has been said by a high authority that the Indian Legislature should confine itself to the amendment of Adjective Law, leaving Substantive Law to the Indian Law Commissioners. It is meant no doubt that the Indian Legislature should only occupy itself, *proprio motu*, with improvements in police, in administration, in the mechanism and procedure of courts of justice. This proposition appears to me a very reasonable one in the main, but it is nearly an exact description of the character of our legislation. We do not meddle with Private Rights; we only create Official Duties. No doubt Act X. of 1865 and Act XV. of 1866 do considerably modify Private Rights, but the first is a chapter and the last a section of the Civil Code framed in England by the Law Commissioners.

The Paper does not of course express the urgency with which the measures which it names are pressed on us by their originators—the Local Governments. My colleagues are, I believe, aware that the earnestness with which these Governments demand legislation, as absolutely necessary for the discharge of their duties to the people, is sometimes very remarkable. I am very far indeed from be-

lieving that, as they are now constituted, they think the Supreme Council precipitate in legislation. I could at this moment name half a dozen instances in which the present Lieutenant-Governors of Bengal and the North-West deem the hesitation of the Government of India in recommending particular enactments to the Legislature unnecessary and unjustifiable.

While it does not seem to me open to doubt that the Government of India is entirely free from the charge of initiating legislation in too great abundance, it may nevertheless be said that we ought to oppose a firmer resistance to the demands of the Local Governments and other authorities for legislative measures. It seems desirable therefore that I should say something of the influences which prompt these Governments, and which constitute the causes of the increase in Indian legislation. I must premise that I do not propose to dwell on causes of great generality. Most people would admit that, for good or for evil, the country is changing rapidly, though not at uniform speed. Opinion, belief, usage, and taste are obviously undergoing more or less modification everywhere. The standard of good government before the minds of officials is constantly shifting, perhaps it is rising. These phenomena are doubtless among the ultimate causes of legislation; but, unless more special causes are assigned, the explanation will never be satisfactory to many minds.

I will first specify a cause which is in itself of a merely formal nature, but which still contributes greatly for the time to the necessity for legislation. This is the effect of the Indian Councils' Act of 1861 upon the system which existed before that date in the Non-Regulation Provinces. It is well known that, in any strict sense of the word, the Executive Government legislated for those Provinces up to 1861. The orders, instructions, circulars, and rules for the guidance of officers which it constantly issued were,

to a certain extent, essentially of a legislative character, but then they were scarcely ever in a legislative form. It is not matter of surprise that this should have been so, for the authority prescribing the rule immediately modified or explained it, if it gave rise to any inconvenience, or was found to be ambiguous. But the system (of which the legality had long been doubted) was destroyed by the Indian Councils' Act. No Legislative power now exists in India which is not derived from this Statute; but to prevent a wholesale cancellation of essentially legislative rules, the 25th Section gave the force of law to all rules made previously for Non-Regulation Provinces by or under the authority of the Government of India, or of a Lieutenant-Governor. By this provision, an enormous and most miscellaneous mass of rules, clothed to a great extent in general and popular language, was suddenly established as law, and invested with solidity and unchangeableness to a degree which its authors had never contemplated. The difficulty of ascertaining what is law and what is not in the former Non-Regulation Provinces is really incredible. I have, for instance, been seriously in doubt whether a particular clause of a Circular intended to prescribe a rule or to convey a sarcasm. The necessity for authoritatively declaring rules of this kind, for putting them into precise language, for amending them when their policy is doubted, or when they are tried by the severer judicial tests now applied to them, they give different results from those intended by their authors, is among the most imperative causes of legislation. Such legislation will, however, diminish as the process of simplifying and declaring these rules goes on, and must ultimately come to a close.

I now come to springs of legislation which appear to increase in activity rather than otherwise. First among these I do not hesitate to place the growing influence of courts of justice and of legal practitioners. Our Courts

are becoming more careful of precise rule both at the top and at the bottom. The more careful legal education of the young civilians and of the younger Native judges diffuses the habit of precision from below; the High Courts, in the exercise of their powers of supervision, are more and more insisting on exactness from above.

An even more powerful influence is the immense multiplication of legal practitioners in the country. I am not now speaking of European practitioners, though their number has greatly increased of late, and though they penetrate much further into the Mofussil than of old. The great addition, however, is to the numbers and influence of the Native Bar. Practically a young educated Native, pretending to anything above a clerkship, adopts one of two occupations—either he goes into the service of Government or he joins the Native Bar. I am told, and I believe it to be true, that the Bar is getting to be more and more preferred to Government service by the educated youth of the country, both on the score of its gainfulness and on the score of its independence.

Now the law of India is at present, and probably will long continue to be, in a state which furnishes opportunity for the suggestion of doubts almost without limit. The older written law of India (the Regulations and earlier Acts) is declared in language which, judged by modern requirements, must be called popular. The authoritative Native treatises on law are so vague that, from many of the dicta embodied by them, almost any conclusion can be drawn. More than that, there are, as the Indian Law Commissioners have pointed out, vast gaps and interspaces in the Substantive Law of India; there are subjects on which no rules exist; and the rules actually applied by the Courts are taken, a good deal at haphazard, from popular text-books of English law. Such a condition of things is a mine of legal difficulty. The Courts are getting ever more rigid in their demand of legal warrant for the actions of all

men, officials included. The lawyers who practise before them are getting more and more astute, and render the difficulty of pointing to such legal warrant day by day greater. And unquestionably the Natives of India, living in the constant presence of courts and lawyers, are growing every day less disposed to regard an Act or Order which they dislike as an unkindly dispensation of Providence, which must be submitted to with all the patience at their command. If British rule is doing nothing else, it is steadily communicating to the Native the consciousness of positive rights, not dependent on opinion or usage, but capable of being actively enforced.

It is not, I think, difficult to see how this state of the law and this condition of the Courts and Bar render it necessary for the Local Governments, as being responsible for the efficiency of their administration, to press for legislation. The nature of the necessity can best be judged by considering what would be the consequences if there were no legislation, or not enough. A vast variety of points would be unsettled until the highest tribunals had the opportunity of deciding them, and the government of the country would be to a great extent handed over to the High Courts, or to other Courts of Appeal. No court of justice, however, can pay other than incidental regard to considerations of expediency, and the result would be that the country would be governed on principles which have no necessary relation to policy or statesmanship. It is the justification of legislation that it settles difficulties as soon as they arise, and settles them upon considerations which a court of justice is obliged to leave out of sight.

The consequences of leaving India to be governed by the Courts would, in my judgment, be most disastrous. The bolder sort of officials would, I think, go on without regard to legal rule, until something like the deadlock would be reached with which we are about to deal in the Punjab. But the great majority of administrative officials,

whether weaker or less reckless, would observe a caution and hesitation for which the doubtful state of the law could always be pleaded. There would, in fact, be a paralysis of administration throughout the country.

The fact established by the Paper, that the duties created by Indian legislation are almost entirely official duties, explains the dislike of legislation which occasionally shows itself here and there in India. I must confess that I have always believed the feeling, so far as it exists, to be official, and to correspond very closely to the repugnance which most lawyers feel to having the most disorderly branch of case-law superseded by the simplest and best drawn of statutes. The truth is, that nobody likes innovations on knowledge which he has once acquired with difficulty. If there was one legislative change which seemed at the time to be more rebelled against than another, it was the supersession of the former Civil Procedure of the Punjab by the Code of Civil Procedure. The Civil Procedure of the Punjab had originally been exceedingly simple, and far better suited to the country than the then existing procedure of the Regulation Provinces. But two years ago it had become so overlaid by explanations and modifications conveyed in Circular orders, that I do not hesitate to pronounce it as uncertain and difficult a body of rules as I ever attempted to study. I can speak with confidence on the point; for I came to India strange both to the Code of Civil Procedure and to the Civil Procedure of the Punjab, and, while the first has always seemed to me nearly the simplest and clearest system of the kind in the world, I must own I never felt sure in any case what was the Punjab rule. The introduction of the Code was, in fact, the merest act of justice to the young generation of Punjab officials, yet the older men spoke of the measure as if some ultra-technical body of law were being forced on a service accustomed to courts of primitive simplicity.

It must, on the other hand, be admitted that, in creating new official duties by legislation, we probably in some degree fetter official discretion. There is no doubt a decay of discretionary administration throughout India; and, indeed, it may be said that in one sense there is now not more, but much less, legislation in the country than formerly; for, strictly speaking, legislation takes place every time a new rule is set to the people, and it may be taken for granted that in earlier days Collectors and Commissioners changed their rules far oftener than does the Legislature at present. The truth is, discretionary government is inconsistent with the existence of regular courts and trained lawyers, and, since these must be tolerated, the proper course seems to me not to indulge in vague condemnation of legislation, but to discover expedients by which its tendency to hamper discretion may be minimised. One of these may be found in the skilful drafting of our laws—in confining them as much as possible to the statement of principles and of well-considered general propositions, and in encumbering them as little as possible with detail. Another may be pointed out in the extension of the wholesale practice of conferring by our Acts on Local Governments or other authorities the power of making rules consistent with the Act—a power in the exercise of which they will be assisted by the Legislative Department under a recent order of His Excellency. Lastly, but principally, we may hope to mitigate the inconveniences of legislation by the simplification of our legislative machinery as applied to those less advanced parts of the country where a large discretion must inevitably be vested in the administrator. The power of easily altering rules when they chafe, and of easily indemnifying officials when they transgress rules in good faith, is urgently needed by us in respect of the wilder territory of India.

While I admit that the abridgment of discretion by written laws is to some extent an evil—though, under the

actual circumstances of India, an inevitable evil—I do not admit the proposition which is sometimes advanced, that the Natives of India dislike the abridgment of official discretion. This assertion seems to me not only unsupported by any evidence, but to be contrary to all the probabilities. It may be allowed that in some cases discretionary government is absolutely necessary; but why should a people, which measures religious zeal and personal rank and respectability by rigid adherence to usage and custom, have a fancy for rapid changes in the actions of its governors, and prefer a regimen of discretion sometimes coming close upon caprice to a regimen of law? I do not profess to know the Natives of this country as well as others, but if they are to be judged by their writings, they have no such preference. The educated youth of India certainly affect a dislike of many things which they do not care about, and pretend to many tastes which they do not really share; but the repugnance which they invariably profess for discretionary government has always seemed to me genuinely hearty and sincere.

APPENDIX II.[1]

G. L. v. Maurer, Einleitung zur Geschichte der Mark-, Hof-, Dorf-, und Stadt-Verfassung und der öffentlichen Gewalt. München.

G. L. v. Maurer, Geschichte der Dorfverfassung in Deutschland. Erlangen.

G. L. v. Maurer, Geschichte der Frohnhöfe, der Bauernhöfe und der Hofverfassung in Deutschland. Erlangen.

G. L. v. Maurer, Geschichte der Markenverfassung in Deutschland. Erlangen.

G. L. v. Maurer, Geschichte der Städteverfassung in Deutschland. Erlangen.

E. Nasse, Ueber die mittelalterliche Feldgemeinschaft und die Einhegungen des sechszehnten Jahrhunderts in England. Bonn.

G. Landau, Die Territorien in Bezug auf ihre Bildung und ihre Entwickelung. Hamburg.

G. Landau. Das Salgut. Kassel.

Ch. Lette, Die Vertheilung des Grundeigenthums in Zusammenhang mit der Geschichte der Gesetzgebung und den Volkszuständen. Berlin.

N. Kindlinger, Geschichte der deutschen Hörigkeit, insbesondere der sogenannten Leibeigenschaft. Berlin.

W. Gessner, Geschichtliche Entwickelung der gutsherrlichen und bäuerlichen Verhältnisse Deutschlands, oder practische Geschichte der deutschen Hörigkeit. Berlin.

Von Haxthausen, Ueber die Agrarverfassung in Norddeutschland. Berlin.

[1] Recent German Works bearing on the subject of the Lectures on Village-Communities.

NOTE A.[1]

'THE Religion of an Indian Province' (*Fortnightly Review*, Feb. 1, 1872); 'Our Religious Policy in India' (*Fortnightly Review*, April 1, 1872); 'The Religious Situation in India' (*Fortnightly Review*, Aug. 1, 1872); 'Witchcraft and Non-Christian Religions' (*Fortnightly Review*, April 1, 1873); 'Islam in India' (*Theological Review*, April 1872); 'Missionary Religions' (*Fortnightly Review*, July 1, 1874).

I take the following passages from the 'Berár Gazetteer,' edited by Mr. Lyall:—

The cultus of the elder or classic Hindú Pantheon is only a portion of the popular religion of this country. Here in India, more than in any other part of the world, do men worship most what they understand least. Not only do they adore all strange phenomena and incomprehensible forces—being driven by incessant awe of the invisible powers to propitiate every unusual shape or striking natural object—but their pantheistic piety leads them to invest with a mysterious potentiality the animals which are most useful to man, and even the implements of a profitable trade. The husbandman adores his cow and his plough, the merchant pays devotion to his account-book, the writer to his inkstand. The people have set up tutelary deities without number, who watch over the interests of separate classes and callings, and who are served by queer rites peculiar to their shrines. Then there is an infinite army of demigods, martyrs, and saints, of which the last-named division is being continually recruited by the death, in full odour of sanctity, of hermits, ascetics, and even men

[1] Mr. Lyall's publications.

who have been noted for private virtues in a worldly career. And perhaps the most curious section of these canonized saints contains those who have caught the reverent fancy of the people by peculiar qualities, by personal deformity, by mere outlandish strangeness; or who have created a deep impression by some great misfortune of their life or by the circumstances of their death. All such striking peculiarities and accidents seem to be regarded as manifestations of the ever-active divine energy, and are honoured accordingly. Thus it is not easy to describe in a few pages the creeds and forms of worship which prevail even in one small province of India, although in this imperfect sketch nothing is mentioned but what is actually practised within Berár. This is one of those provinces in which the population is tinged throughout by the strong sediment of aboriginal races that have been absorbed into the lowest castes at bottom. . . . . Therefore it may be expected that many obscure primeval deities owned by the aboriginal liturgies, and many uncouth rustic divinities set up by the shepherds or herdsmen amid the melancholy woods, will have found entry into the Berár pantheon. Nevertheless, we have here, on the whole, a fair average sample of Hindúism, as it exists at this time throughout the greater part of India; for we know that the religion varies in different parts of this vast country with endless diversity of detail. Vishnu and Shiva, with their more famous incarnations, are of course recognised and universally honoured by all in Berár. The great holidays and feasts of the religious calendar kept by Western India are duly observed; and the forms and ceremonies prescribed by Bráhmanical ordinance are generally the same as throughout Maháráshtra. The followers of Shiva are much the most numerous, especially among the Bráhmans. . . . . .

Berár is liberally provided with canonized saints, who are in a dim way supposed to act as intercessors between mortals and the unseen powers, or at any rate to possess some mysterious influence for good and evil, which can be

propitiated by sacrifice and offering. Pilgrimages are made to the tombs of these saints, for it must be noted that a man is always buried (not burnt) who has devoted himself entirely to religious practices, or whom the gods have marked for their own by some curious and wonderful visitation. When an ascetic, or a man widely renowned for virtue, has acquired the name of a *sádhu*, or saint, he is often consulted much during his lifetime, and a few lucky prescriptions or prophecies gain him a reputation for miracle-working. To such an one do all the people round give head, from the least to the greatest, saying, as of Simon Magus, 'This man is the great power of God;' he is a visible manifestation of the divine energy which his virtue and self-denial have absorbed. The large fairs at Wadnera (Elichpúr district), Akot, Nágar Tás, and other places, took their origin from the annual concourse at the shrines of these *sádhus*. At Akot the saint is still living; at Wadnera he died nearly a century ago, and his descendants live on the pious offerings; at Jalgaon a crazy vagrant was canonized two or three years back on grounds which strict people consider insufficient. There is no doubt that the Hindú religion requires a pope, or acknowledged orthodox head, to control its wonderful elasticity and receptivity, to keep up the standard of deities and saints, to keep down their number, and generally to prevent superstition from running wild into a tangled jungle of polytheism. At present public opinion consecrates whom it likes, and the Bráhmans are perfectly tolerant of all intruders, though service at these shrines may be done by any caste. . . . . .

The leading saints of Berár disdain any romantic origin. They have wrested from the reluctant gods, by sheer piety and relentless austerity, a portion of the divine thaumaturgic power, and it exhales after their death from the places where their bodies were laid. Donations and thank-offerings pour in; endowments of land and cash used to be made before English rule drew a broad line between religion and

revenue; a handsome shrine is built up; a yearly festival is established; and the pious descendants of the saint usually instal themselves as hereditary stewards of the mysteries and the temporalities. After this manner have the sepulchres of Srí Á yan Náth Máhárájand Hanumant Ráo Sádhu become rich and famous in the country round Umarkher. It has been said that the Hindús worship indifferently at Mahometan and Hindú tombs, looking only to wonder-working sanctity; in fact, the holy man now in the flesh at Akot has only taken over the business, as it were, from a Mahometan fakír, whose disciple he was during life; and, now that the fakír is dead, Narsing Báwa presides over the annual veneration of his slippers. . . . . .

It may be conjectured that whenever there has arisen among this host of saints and hermits a man who added to asceticism and a spiritual kind of life that active intellectual originality which impels to the attack of old doctrines and the preaching of new ones, then a sect has been founded, and a new light revealed. And the men who have created and confirmed the great religious movements in Hindúism are not always left in the humble grade of saints; they are discovered to be incarnations of the highest deities; while the transmission of this divinity to other bodies is sometimes perpetuated, sometimes arrested at the departure of him who first received it. No such great prophet has been seen in Berár, but the votaries of some famous Indian dissidents are numerous. This is not the place to discuss their various tenets, yet their denominations may be mentioned.

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